84-964

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE AUGUST J. C. EGLE

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE HONORABLE JERRE S. WILLIAMS, THE HONORABLE E. GRADY JOLLY, JUDGES FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE HONORABLE HUBERT L. WILL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, SITTING BY DESIGNATION

BENJAMIN A. NEIL,
3500 Bank Street,
Baltimore, Maryland 21224,
(301) 342-4400,
Attorney for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1. Whether the decision by the Court of Appeals to, in effect, remand a single issue of a marital property division to a state court resulted in a denial of due process and violated the concept of fundamental fairness?

2. Whether the Court of Appeals' decision in conjunciton with Panama Canal Treaty's abolishment of court of original jurisdiction has denied access to the court to both parties in this case?

3. Whether a trial court of necessity should be designated where the trial court of original jurisdiction has been abolished and there has been continuing violations of an existing court order along with a change in circumstances which may result in a modification order if the parties had access to a court?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

In Re AUGUST J.C. EGLE

Petition For A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE HONORABLE JERRE S. WILLIAMS. THE HONORABLE E. GRADY JOLLY, JUDGES FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE HONORABLE HUBERT L. WILL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, SITTING BY DESIGNATION FOR THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner, August J.C. Egle, respect-

fully prays that a Writ of Mandamus issue from this Court directed to the Honorable United States Court of Appeals for the Fifth Circuit and to the Honorable Jerre S. Williams, the Honorable E. Grady Jolly, Judges for the United States Court of Appeals for the Fifth Circuit and the Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois, sitting by Designation for the United States Court of Appeals for the Fifth Circuit, requiring said Honorable Jerre S. Williams, E. Grady Jolly and Hubert L. Will, to show cause on a day to be fixed by this Court why Mandamus should not issue from this Court directing said Honorable Jerre S. Williams, E. Grady Jolly and Hubert L. Will to designate a trial court of necessity and why your petitioner should not have such other and further relief in the premises as may be just.

OPINION BELOW

The opinion of the court of appeals is

reported at 715 F.2d 999 (5th Cir. 1983). The unpublished opinions of the District Court for the District of the Canal Zone appear in the Appendix hereto.

[1]The petitioner August J.C. Egle was the Plaintiff-Appellee below. The only party to this proceedings was Ann E. Schraedel Egle (Haff) Defendant - Appellant.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 30, 1983. A motion requesting time for leave to file Petition for Re-hearing and suggestion for Re-hearing En Banc and Out of Time was denied on April 27, 1984. A motion for review pursuant to Federal Rule of Appellate Procedure #27 was denied on May 30, 1984. This Court's jurisdiction is invoked under 28 U.S.C.(a) (1952).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED UNITED STATES CONSTITUTION,

Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law.

Panama Canal Treaty, September 7, 1977, United States - Panama Art. XI

para. 1, 5-7, T.I.A.S. No. 10029, 10030 (entry into force October 1, 1979).

ARTICLE XI

PROVISIONS FOR THE TRANSITION PERIOD

1. The Republic of Panama shall reassume plenary jurisdiction over the former Canal Zone upon entry into force of this Treaty and in accordance with its terms. In order to provide for an orderly transition to the full application of the jurisdiction arrangements established by this Treaty and related agreements, the provisions of this article shall become applicable upon the date this Treaty enters into force, and shall remain in effect for thirty calendar months. The authority granted in this Article to the United States of America for this transition period shall supplement, and is not intended to limit, the full application and effect of the rights

and authority granted to the United States of America elsewhere in this Treaty and in related agreements.

* * *

5. The Courts of the United States of America and related personnel, functioning in the former Canal Zone immediately prior to the entry into force of this Treaty, may continue to function during the transition period for the judicial enforcement of the jurisdiction to be exercised by the United States of America in accordance with this Article.

6. In civil cases, the civilian courts of the United States of America in the Republic of Panama shall have no jurisdiction over new cases of a private civil nature, but shall retain full jurisdiction during the transition period to dispose of any civil cases, including admiralty cases, already instituted and

pending before the courts prior to the entry into force of this Treaty.

7. The laws, regulations, and administrative authority of the United States of America applicable in the former Canal Zone immediately prior to the entry into force of this Treaty shall, to the extent not inconsistent with this Treaty and related agreements, continue in force for the purpose of the exercise by the United States of America of Law Enforcement and Judicial Jurisdiction only during the transition period. The United States of America may amend, repeal or otherwise change such laws, regulations and administrative authority. The two parties shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pending at the end of the trans-

ition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instrument.

* * *

STATEMENT OF THE CASE

On August 13, 1979, AUGUST J.C. EGLE, petitioner herein, filed a complaint seeking a divorce in the United States District Court for the District of the Canal Zone, Cristobal Division. Mr. Egle a United States citizen, has been a continuous resident of the Canal Zone since June 1, 1978 and at that time of the filing of the complaint his wife, a United States citizen, was a resident of the Canal Zone. The complaint set out that he and his wife were married on September 3, 1960 and were separated on August 5, 1979. It also alleged that two boys were born of this marriage. The complaint requested a division of com-

munity property, a divorce on the grounds of extreme cruelty and custody of the minor sons.

On July 18, 1980, after a three-day trial in the United States District Court for the District of the Canal Zone, Judge Virgil Pittman filed his Opinion and Order. This established custody, alimony, support, a division of certain assets and liabilities between the parties and set up a procedure by which other property (household goods) would be inventoried and divided between them. Judge Pittman also ordered that Mr. Egle pay Mrs. Egle $10,000.00 within one year of the date of the decree for her interest in their Maryland home.

On August 5, 1980, Judge Pittman entered his "Supplemental Findings of Facts and Conclusions of Law". App 260a. The order contained one decision signi-

ficant to this petition. Judge Pittman revoked his earlier decision that Mrs. Egle convey her interest in the Maryland home to Mr. Egle for $10,000.00. His reasoning was that the provisions in the Canal Zone Code for distribution of community property upon divorce applied to only personal property and not to real property located outside the Canal Zone. A final Decree of Divorce Nunc Pro Tunc was entered on May 8, 1981 by Judge McFadden. App 257a .

In September 1981, Judge McFadden conducted a hearing in the court house for United States District Court for the Southern District of Florida. At this hearing a resolution was made concerning the division of the personal property under the supervision of a neutral third party. Judge McFadden also concluded that the court had jurisdiction and the

Canal Zone laws applied to the Maryland real estate. Therefore, he decided that Judge Pittman has been wrong in setting the original order aside and he reinstated the order for the transfer of the wife's interest in the Maryland home to the husband upon the payment of $10,000.00. App 254a.

Mrs. Egle appealed to the Fifth Circuit Court of Appeals from the reinstatement order of Judge McFadden mandating conveyance to her former husband of her interest in the Maryland Home.

The court of appeals considered the merits of the appeal without the benefit of oral argument and in an expedite fashion due to the possibility that the appellate jurisdiction might expire under the Panama Canal Treaty. The panel affirmed the reinstatement order on its merits. Egle v. Egle, 673 F.2d 1236

(5th Cir. 1983); App 252a.

A Petition for Re-hearing was filed on April 8, 1982, App 250a. On October 15, 1982 the panel vacated its affirmance of the reinstatement order and transfered the appeal to the oral arguments calendar. App 250a .

Oral Arguments were heard January 24, 1983 and the Court of Appeals for the Fifth Circuit decision was filed September 30, 1983. Egle v. Egle, 715 F.2d 999 (5th Cir. 1983); App 129a.

The court acknowledged jurisdiction over the Maryland real property but reversed the modification order pertaining to the Maryland real estate on the grounds of insufficient evidence. The court left the parties to pursue whatever remedies available to them in Maryland. Id. at 1099; App 247a.

REASONS FOR GRANTING THE WRIT

1. The court of appeals' decision to, in effect, remand a single issue of a marital property division to a state court resulted in a denial of due process of law and violated the concept of fundamental fairness.

The content of due process is that which is consistent with the deepest notions of what is fair, right and just. Solebee v. Balkcom, 339 U.S. 9,16 (1950). Due process is violated if an action by a court "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Snyder v. Massachusetts, 291 U.S. 97, 105 (1954).

After a review of the proceedings in the Egle case the court of appeals' decision clearly conflicts with the notion of what is fair, right, and just.

The case has been through many jurisdictions and has consumed a great deal of trial time. The district court in exercising its equitable powers, made a very detailed property division, part of which was the order for the wife to relinquish her interest in the Maryland home for $10,000.00. App 103a,28a. The court of appeals was confronted with only one of the many property issues involved in this case and it should have deferred to the trial court's discretion. See, Hipp v. Hipp, 191 F.Supp. 299 (D. D.C. 1960) affirmed, 296 F.2d 429 (D.C. Cir. 1961). Instead, it vacated the order concerning the Maryland property and left the parties to seek whatever relief that was available to them in the Maryland courts. Egle v. Egle, 715 F.2d 999, 1019 (5th Cir. 1983); App 247a .

This order was, in effect, a remand to a state court of a single issue of a very complex property distribution. To obtain relief the parties have to re-litigate an issue already litigated for several years and the benefit of any record established through the Federal Court System would be lost. Therefore, any equities considered in the entire matter would no longer have an effect on the issue in the state court.

Presuming the court of appeals was correct in vacating the district court's order a Writ of Mandamus should issue from this Court directing the Court of appeals to designate a trial court of necessity within the federal court system. This would allow a review of the entire record and a determination could be made in light of all the equities involved in this case.

2. The petitioner herein has been denied access to the federal court system which has accepted and acknowledged jurisdiction.

The court of appeals discussed in detail their jurisdiction of the Egle case and decided that the court did have appellate jurisdiction of the decisions of the Canal Zone District Court. Egle v. Egle, 715 F.2d, 999, 1008-13 (5th Cir. 1983); App189a-211a. Additionally, the court agreed with Judge McFadden's reinstatement order regarding jurisdiction of the district court to allocate the parties' interest in the Maryland real property. Id. at 1019, App 244-247a.

The decision to vacate the order of the district court and to allow the parties to seek whatever relief they may find in the Maryland courts was inappropriate to the situation and was an abuse

of appellate jurisdiction. A trial court of necessity should have been designated by the court of appeals to allow the case to be resolved in the federal courts which had jurisdiction, since the trial court of original jurisdiction was abolished by the Panama Canal Treaty, September 7, 1977, United States - Panama, Art. XI para. 1, 5-7, T.I.A.S. No. 10029, 10030. The petitioner herein rightfully and properly litigated his case before the federal courts, See, Egle v. Egle, 715 F.2d 999 (5th Cir. 1983), and should not have been denied access to a court that would review the entire equities involved in this complex domestic matter. See, U.S. Const. Amend. V; Snyder v. Massachusetts, 291 U.S. 97, 105 (1954); Solibee v. Balkcom, 339 U.S. 9,16 (1950).

3. The Panama Canal Treaty has abolished the District Court for the Dis-

trict of the Canal Zone which was the court of original jurisdiction in this case. There are continuing violations of an existing court order along with changes in circumstances which may justify a modification order, but no court in which the parties may seek relief.

The United States District Court for the District of the Canal Zone ceased to exist as of April 1, 1982, pursuant to Art XI of the Panama Canal Treaty. This action was properly within this court's jurisdiction when the Bill of Complaint was filed on August 13, 1979. Within the next several years the action was litigated with several orders emanating from the district court concerning alimony, support, custody and property distribution, etc. See App 59a-93a . There are now continuing problems concerning the property distribution and there has been a change

in circumstances which may result in modification of the order if the petitioner herein had access to a court in which to pursue the appropriate relief. A federal trial court of necessity would not only have jurisdiction over the matter but would also have the benefit of the entire record of these proceedings to make any determination that is necessary.

CONCLUSION

For these reasons, a Writ of Mandamus should issue from this Court directed to the Honorable United States Court of Appeals and to the Honorable Jerre S. Williams, E. Grady Jolly and Hubert L. Will to designate a Trial Court of Necessity.

Respectfully submitted,

Benjamin A. Neil

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-3037

AUGUST J. C. EGLE,

Plaintiff-Appellee,

versus

ANN E. SCHRAEDEL EGEL,

Defendant-appellant.

Appeal from the United States District Court for the District of the Canal Zone.

Before WILLIAMS and JOLLY, Circuit Judges, and WILL*, District Judge.

B Y T H E C O U R T

IT IS ORDERED that appellee's motion for reconsideration of the Court's

order entered on April 27, 1984, is DENIED.

*District Judge of the Northern District of Illinois, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ANN E. SCHRADEL (HAFF)	*	
	*	
Defendant-Appellant,	*	
	*	
v.	*	
	*	No. 82-
AUGUST J. C. EGLE,	*	
	*	3037
Plaintiff-Appellee.	*	
	*	
* * * * * * * * * * * * * * * *	*	

MOTION FOR REVIEW TO FEDERAL RULE OF APPELLATE PROCEDURE #27

TO THE HONORABLE, THE JUDGES OF SAID COURT:

AUGUST J. C. EGLE, by Benjamin A. Neil, his attorney, moves this Honorable Court to grant a review of the Courts most recent Order.

1. That the Plaintiff-Appellee filed a Motion requesting extension of time for leave to file petition for re-hear-

ing and a leave to file petition for rehearing enbanc and out of time with this Honorable Court.

2. That he subsequently received a short form Order signed by United States Circuit Judge Jerre S. Williams denying said motion.

3. That the Movant respectfully requests pursuant to Federal Rule of Appellate Procedure Number 27 (c) a review by this Court of the action taken by Judge Williams.

WHEREFORE, the Movant prays:

A. That this Honorable Court review the decision rendered by Judge Jerre S. Williams which was docketed with this Court on April 27, 1984.

B. That the Movant be awarded such other and further relief as the nature of his cause may require.

/s/ Benjamin A. Neil

Benjamin A. Neil, Esquire
3500 Bank Street
Baltimore, Maryland 21224
(301) 342-4400
Attorney for August J.C. Egle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 1984, a copy of the foregoing Motion was mailed, postage prepaid to Flaxman and Flaxman, P.A., Attorneys for Appellant, 2600 Douglas Road, Suite 311, Coral Gables, Florida 33134.

/s/ Benjamin A. Neil

BENJAMIN A. NEIL, ESQUIRE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-3037

AUGUST J. C. EGLE,

Plaintiff-Appellee,

verses

ANN E. SCHRAEDEL EGLE,

Defendant-Appellant.

Appeal from the United States District Court for the District of the Canal Zone

---

ORDER:

IT IS ORDERED that appellee's motion to extend the time for the filing of a petition for rehearing and suggestion for rehearing en banc out of time is DENIED.

/s/ JERRE S. WILLIAMS

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ANN E. SCHRADEL EGLE (HAFF)	*
Defendant-Appellant,	*
v.	*No. 82-3037
AUGUST J. C. EGLE,	*
Plaintiff-Appellee.	*

* * * * * * * * * * * * * * * * * *

MOTION REQUESTING EXTENSION OF TIME FOR LEAVE TO FILE PETITION FOR RE-HEARING AND LEAVE TO FILE PETITION FOR RE-HEARING EN BANC AND OUT OF TIME

TO THE HONORABLE, THE JUDGES OF SAID COURT:

AUGUST J. C. EGLE, by Benjamin A. Neil, his attorney, moves this Honorable Court to grant an extension of time for

leave to file a Petition for Re-hearing and leave to file a Petition for Re-hearing En Banc and Out of Time.

1. This appeal of a civil action was taken from a judgment of the United States District Court for the District of the Canal Zone, a court that ceased to exist as of April 1, 1982, pursuant to an international agreement between the Republic of Panama and the United States. See Panama Canal Treaty, done September 7, 1977, reprinted in 16 Int'l. Leg. Mat. 1022 (1977), art. XI.

2. On Monday, January 24, 1983, this Court heard oral argument in this matter and thereafter issued forth a decision on September 30, 1983.

3. Subsequent to this decision, Mrs. Egle (now Haff) initiated legal proceedings in the State of Maryland

(entitled Haff v. Egle, Circuit Court for Anne Arundel County, Equity No. 3103478) for a public auction sale of the real property in question.

4. As a result of this action, the movant herein undertook to locate the Court records from the federal case (CV 80-3037) so as to provide his counsel with proper and adequate information to prepare a defense in the Maryland State action.

5. To the movant's surprise, transcripts, depositions, exhibits letters, pleadings and various orders covering case #CV-79-3348-C were located in the National Records Center, located in Suitland, Maryland. (See Exhibit #1) Said records are located at accession #21-82-13, location #01/12:13-7-1 7-AN;

Agency Box #10 and 11.

6. That a number of events occurred between approximately March 8, 1984 until March 14, 1984 which are covered and included in movant's Exhibit #1. (Which is hereby incorporated and requested to be made a part hereof.)

7. That on March 30, 1984, Frank H. McFadden (former Federal Judge upon whom this appeal was taken) wrote to Benjamin A. Neil, Counsel for the Movant herein. A copy of said letter is included as Movant's Exhibit #2. (Which is hereby incorporated and requested to be made a part hereof.)

8. In part, the letter stated on page two that "Your question, as I understand it, is whether I took into consideration all of the equities in the property division prior to reinstating

the provision. The answer is yes. (Emphasis added). In fact, I thought the provision was generous to the wife."

He goes on to say on page seven that "Certainly, in reviewing and reinstating the order, I thought the equities weighed heavily in favor of the husband having the home and the $10,000 was, in my judgment, generous taking into account all of the factors involved including the division of the other property. I have no clear recollection of the precise interest she had in the property or how it was obtained. My memory is that I did know at the time of the hearings and decision. (Emphasis added) I also believe that she did not pay anything for any such interest and I believe the evidence was that she had not worked during the marriage.

9. The problem with this case is compounded, not only by the Appellate Court's abuse of discretion based on the trial court's decision, but also by the fact that there was an "incomplete record" before the Appellate Court to review.

10. On February 1, 1982, Sarah Belzer, Deputy Clerk for the District of the Canal Zone certified that "the Transcript of Proceedings will be filed at a later date and sent forward at that time" and that she forwarded "the full, true and complete record and proceedings." (Movant's Exhibit #3)

11. The portion of the record which was "never" forwarded was the trial itself. The trial on the "merits" held on June 16, 17, and 18, 1980 before Judge Pittman; (Movant's Exhibits #4a-4g) in-

volving no less than eleven witnesses and three separate days of trial. The court reporter at that time was Sue Robbins.

12. Subsequent to this trial Judge Pittman issued his order which was dated July 18, 1980 and filed on July 22, 1980 at 3:33 p.m. Upon which the appeal was taken concerning the Maryland real property. (Movant's Exhibit #5).

13. None of this information was ever before the appellate panel. Just several days ago, August Egle contacted his counsel herein to inform him that the testimony from the June 16, 17, and 18, 1980 trial was still on reel-to-reel tape. Additionally, he indicated that the tapes were located and found to be in the possession and custody of the Panama Canal Commission (formerly Panama

Canal Company) which is not an arm of the judicial branch.

14. At the time of filing this Motion, Sue Robbins, (the former court reporter) is transcribing the original tape. Although, alas, some testimony is missing and lost forever from the tapes.

15. Clearly, August J.C. Egle has been prejudiced by these actions. It is not counsel's intention to point fingers, but simply to see to it that equity and justice prevail.

16. Counsel herein includes his citations and authority upon which he relies. He asks that this Honorable Court seriously consider these matters as if fully detailed and set out herein. (See Citations and Authority):

WHEREFORE, the Movant prays:

A. That this Honorable Court vacate the Order issued September 30, 1983 with regard to the Maryland real property and reinstate the

requirement of Wife to transfer her interest therein to Husband for $10,000.00.

B. That this Court correct the abuse of discretion and error; in that it over-ruled the findings of the trial judge without having before it sufficient evidence to do so.

C. That this Court allow counsel to file a Petition for Re-Hearing.

D. That this Court allow counsel to file a Request for Re-Consideration En Banc.

E. That this Court grant an oral hearing on said Petition and Request.

F. That this Court correct the injustice and inequities which have surfaced since the time of its original order.

G. That Movant be allowed to retain his boyhood home as was obviously the intention of the trial judge in this

matter.

H. That the ends of justice and fair play be served and that the Movant be awarded such other and further relief as the nature of his cause may require.

Respectfully submitted,

/s/ Benjamin A. Neil

Benjamin A. Neil, Esquire
3500 Bank Street
Baltimore, Maryland 21224
(301) 342-4400
Attorney for August J.C. Egle

AFFIDAVIT

State of Louisiana
City of New Orleans to wit:

I HEREBY CERTIFY that the following is true and correct, to the best of my kwnoledge, information and belief;

1. That Benjamin A. Neil is the Attorney of Record for August J.C. Egle.

2. That the above stated information came to his attention within the last several weeks.

3. That this information was not available to counsel at the time of passage of said Order and is subsequently additionally discovered evidence which has a direct bearing and pertinence in the instant matter.

4. That counsel believes that this is the appropriate action to be taken as a result of the discovery of the original trial transcripts, records, exhibits, and reel-to-reel tapes, and that this action is not being taken for dilatory purposes or prejudice to the opposing party.

5. That I express a belief, based on a reasoned and studied professional

judgment, that this Appeal involves one or more questions of exceptional importance to this Court:

A) the impact and effect of newly discovered evidence on the Court's Order, and

B) the effect and prejudicial impact on the Movant as the result of an error in the transmission of the record herein.

6. Counsel further states that the above-styled Motion is being filed in the interest of justice and equity pursuant to his charge to adequately represent his client and fulfill his duties as an Officer of the Court.

/s/ Benjamin A. Neil

AFFIANT

Subscribed and sworn this 20th day of April, 1984.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April, 1984, a copy of the foregoing Motion was mailed, postage prepaid to Flaxman and Flaxman, P.A., Attorneys for Appellant, 2600 Douglas Road, Suite 311, Coral Gables, Florida 33134.

/s/ Benjamin A. Neil

BENJAMIN S. NEIL, ESQUIRE

CITATIONS AND AUTHORITY

Federal Rule of Civil Procedure-Rule 59

Federal Rule of Civil Procedure-Rule 60

Federal Rule of Civil Procedure-Rule 60(b)

Federal Rules of Appellate Procedure-Rule 10

Federal Rules of Appellate Procedure-Rule 11

Federal Rules of Appellate Procedure-Rule 11(b)

Federal Rules of Appellate Procedure-

Rule 12

U.S. Court of Appeals; Fifth Circuit;
Local Rule 10

U.C. Court of Appeals; Fifth Circuit;
Local Rule 11

Hydramotive Manf. Corp. v. Securities and Exchange Commission, 355 F. 2d 179 (1966)

Wedding v. Wingo, 483 F 2d. 1131, affirmed 94 S. Ct. 2842

In re Colonial Realtiy Inv. Co., 516 F. 2d 154

U. S. for Use and Benefit of Air Comfort, Inc. v. Jones Coal Co., 325 F 2d. 877.

U.S. ex rel Laughlin v. Russell, 282 F. Supp. 106

Blitzstein v. Ford Motor Co., 288 F 2d 738

Business Forms Finishing Service Inc. v. Carson 463 F 2d 966

Cox v. General Elec. Co., 302 F 2d 389

Peymann v. Perini Corp., 507 F 2d 1318, Cert., denied 95 S. Ct. 1572.

Valley Stream Flooring Corp. v. Green Manor Const. Co., 336 F 2d 6.

Rivera Morales v. Benitez de Rexach, 541 F. 2d 882.

Moran Towing Corp. v. M.A. Gammino Const. Co. 363 F 2d 108

Hemming v. U.S., 409 F 2d 11, (5th Cir. 1969)

McDonough Marine Service Inc. v. M/V Royal Street, 608 F 2d 203 (5th Cir. 1979)

Stout v. Jefferson County Bd. of Education, 489 F 2d 97 (5th Cir. 1974)

U.S. v. Mori, 444 F 2d 240 (5th Cir.) cert. denied 404 U.S. 913 (1971)

United States v. Smith, 493 F 2d 907 (5th Cir. 1974).

United States v. Selva, 559 F. 2d 1303

(5th Cir. 1977)

Anthony v. United States, 667 F 2d 870, (10th Cir. 1981)

A&S Liquidating Co. v. Carter 465 F 2d 359 (5th Cir. 1972)

Soley v. Star & Herald Co., 390 F 2d 364 (5th Cir.) cert. denied 419 U.S. 851 (1974)

Gammill Co., Inc. v. Asher, 423 F 2d 627 (5th Cir. 1970)

Thompson v. American Airlines, Inc., 422 F 2d 350 (5th Cir. 1970).

Pyramid Mobile Homes, Inc. v. Speake, 531 F 2d 743 (5th Cir. 1976).

LIST OF EXHIBITS

#1 Motion to Vacate Order (Maryland State Case)

#2 McFadden Letter of March 30, 1984

#3 Sarah Belzer Certification; February 1, 1982

#4 a. Docket entries

b. Notice to Counsel

c. Minutes of Trial - June 16, 1980

d. Minutes of Trail - June 17, 1980

e. Minutes of Trial - June 18, 1980

f. Service of Process of Witness

g. Subpoena for Witness

#5 Judge Pittman's Order of July 18, 1980

ANNE E. SCHRAEDEL HAFF	*	IN THE CIRCUIT
Plaintiff	*	COURT FOR ANNE
V.	*	ARUNDEL COUNTY
AUGUST J.C. EGLE	*	EQUITY No.
Defendant	*	3103478
* * *	*	* * *

MOTION TO VACATE ORDER

TO THE HONORABLE, THE JUDE OF SAID COURT:

AUGUST J.C. EGLE, Defendant, by Benjamin A. Neil, his attorney, moves this Honorable Court to Vacate the Order signed on February 8, 1984 in which the fee simple property known as 105 Third Avenue, Glen Burnie, Anne Arundel County, Maryland, the subject property in these proceedings, was to be sold at public auction. The reasons for said Motion are as follows:

1. That this matter came on before the Court of Special Appeals and

after oral argument, was remanded to this Court for further proceedings not inconsistent with the opinion of the Court of Special Appeals.

2. The action taken by the Court of Special Appeals was prompted by the decision handed down from the United States Court of Appeals for the Fifth Circuit, involving the same litigants herein and the subject property. In the Court's decision from the Fifth Circuit they vacated the reinstatement of an Order mandating conveyance of certain real property located in Maryland. The reason stated by the Court at that time was that;

> "we see no evidence in the record as to either the extent of Mrs. Egle's interest in the home (i.e., what percentage of any amortization and of any improvements

were made during the marriage) or the fair market value (in 1980, at the time of Judge Pittman's initial Order) of the property. Not being in a position to determine the fairness of the exchange (at the time it was first ordered, we reverse Judge McFadden's reinstatement of Judge Pittman's order regarding this property, and we leave the parties to pursue whatever remedies are available to them in Maryland for the resolution of their respective interests in the property."

3. As a result of these decisions this Honorable Court passes an Order directing sale of the subject property without oral argument or taking evidence in this matter.

4. Subsequent to the Court's

Order, August J.C. Egle contacted his attorney, herein, to inform him that all Court Records from the now defunct Federal District Court for the District of Panama had been apparently transferred to somewhere in Washington, D.C. (It should be noted that the transcripts and records in this matter were not complete as the Federal District Court for the District of Panama was effectively put out of existance, pursuant to a treaty with the Country of Panama. Additionally, this matter took testimony in several locations, including the State of Florida and the Country of Panama and also involved two (2) Federal Judges. Judge Pittman and Judge McFadden.)

5. The records in this matter were subsequently located by counsel for Mr. Egle in the National Records Center, located in Suitland, Maryland.

Thereafter on Friday, March 9, 1984, said counsel was able to review four (4) separate volumns of transcripts, exhibits, correspondence, and lists of personal property and assets involved in this matter. There are in excess of Two Thousand (2000) pages now being retained in the National Records Center in this matter.

6. As a result of finding this new evidence which was unavailable at the time of the passage of the Order because of the transference of Court Records from the Canal Zone/Republic of Panama, counsel for Mr. Egle telephoned Judge McFadden. Judge McFadden is the Judge upon whom the appeal was taken to the Fifth Circuit.

7. Subsequently, Benjamin A. Neil, Counsel for August J.C. Egle, spoke with Judge McFadden to inform him

of the status of the case and the intended sale of the property. The Judge was also informed as to the Court's basis and reasoning for remand. The Judge indicated at that time (March 13, 1984) that he most certainly did take into consideration all equities and fair market value of the property. The Judge additionally indicated that there were several lists involving all personal property, together with valuation of real property including the property in Maryland. Judge McFadden further indicated that the parties had been so minute in their distribution of property and assessment of value that they included such things as the number of forks to be distributed as well as tablecloths, towels, and coat hangers.

8. All of this information was unavailable to counsel at the time of the

signing of the Court Order for Sale. Therefore this information is newly acquired evidence and facts unavailable to counsel upon a reasonable search and inspection thereof. The reason for the unavailability as previously explained was due to the confusion and problems created by the Treaty with the Republic of Panama in which the Federal District Court was effectively "put out of business." Another problem that arose in this matter is that the Court of Appeals for the Fifth Circuit had to remand this cause to the Maryland Courts as they no longer had a Federal Trial Court (i.e., Federal Distrcit Court for Canal Zone/ Republic of Panama) unto which this matter could be remanded for trial within the Federal System.

9. The Court of Appeals for the Fifth Circuit has determined by way of

their Order in this matter that the Federal Courts do have jurisdiction and authority to Order the Relief requested and originally granted in this matter. That is to say the transference of Mrs. Haff's interest in the subject property to Mr. Egle in return for payment of Ten Thousand Dollars ($10,000.00). The only question unresolved was the establishment of equities in that regard.

10. Pursuant to the telephone conversation with Judge McFadden there appears to be no question but that in his determination of this matter he certainly took into consideration all equities. He further stated that he was certain the subject property in Maryland was discussed by the litigating parties and that equity adjustments were calculated by him in passage of the approximately one-dozen Orders involving various

matters in this case.

11. Although Judge McFadden is located and resides in the State of Alabama, he has agreed to make himself available for testimony or a deposition in this regard so as to indicate to the Court in this case his determination of Mrs. Haff's interest and equity in the property, together with the fairness of the exchange which was ordered.

12. Having determined this information subsequent to the passage of the original Order directing sale of the subject property, it would be tantamountly unfair and inequitable to proceed in this matter in those terms as this is an equitable action, which is an outgrowth of the Federal Divorce Case remanded to Maryland by the Federal Courts, this Honorable Court in interest of justice, equity and fairplay, should set

aside the Order dated February 8, 1984 and Order a hearing in this matter together with the taking of testimony.

13. It should be noted that in doing so there would be no prejudice to either party as there can be no showing of prejudice at this time. For that reason the appropriate response by this time. For that reason the appropriate response by this Honorable Court is to Vacate the Order in this matter and to take testimony in Open Court.

WHEREFORE, the Defendant prays:

A. That this Honorable Court Vacate the Order of this Court dated February 8, 1984;

B. That this Honorable Court set this matter in for testimony at the earliest possible convenience;

C. That he be awarded such other and further relief as the nature of his

cause may require.

BENJAMIN A. NEIL & ASSOCIATES

/s/ Benjamin A. Neil

BENJAMIN A. NEIL, ESQUIRE
3500 Bank Street
Baltimore, Maryland 21224
(301) 342-4400
Attorney for the Defendant

AFFIDAVIT

STATE OF MARYLAND

to wit:

CITY OF BALTIMORE

I HEREBY CERTIFY that on this 15 day of March, 1984, before me, the subscriber, a Notary Public of the City and State aforesaid, personally appeared, BENJAMIN A. NEIL, ESQUIRE, and made oath in due form of law;

1. He is the Attorney of Record for the Defendant, August J. C. Egle.

2. That the above stated information came to his attention subsequent to the passage of the Court Order dated February 8, 1984.

3. That this information was not available to counsel at the time of the passage of said Order and is subsequently additionally discovered evidence which ahs a direct bearing and pertinence to the instant matter.

4. That the above-stated information is true and accurate to the best of his information, knowledge, and belief.

5. That Counsel believes that this is the appropriate action to be taken as a result of the discovery of the original Trial Transcripts, Records, and Exhibits, and that this action not being taken for dilatory purpopes or prejudice to the Plaintiff.

6. Counsel furhter states that the above-styled Motion is being filed in the interest of justice and equity pursuant to his charge to adequately represent his client and fulfill his duties as an officer of the Court.

AFFIANT

/s/ Benjamin A. Neil

Subscribed and sworn to before me this 15 day of March, 1984.

_____

Notary Public

My Commission Expires:

_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of March, 1984, a copy of the foregoing Motion to Vacate Order was mailed, postage prepaid, to Howard DeMuth, Jr., Esquire, Sun Life Building - 9th Floor, 20 S. Charles Street, Baltimore, Mary-

land 21201, Attorney for the Plaintiff.

/s/ Benjamin A. Neil

BENJAMIN A. NEIL, ESQUIRE

BLOUNT, INC.
4520 EXECUTIVE PARK DRIVE
P.O. BOX 949
MONTGOMERY AL 36192 1201
205 272-8020

FRANK H. McFADDEN
SENIOR VICE PRESIDENT &
GENERAL COUNSEL

March 30, 1984

Benjamin A. Neil, Esquire
3500 Bank Street
Baltimore, MD 21224

Re: Egle vs. Egle
United States District
Court for the District of
the Canal Zone

Dear Mr. Neil:

This letter is written in re-

sponse to your telephone inquiry to me about my involvement in the referenced divorce case, certain parts of which I handled as a visiting judge. (Prior to my resignation on January 1, 1982, I was Chief Judge of the United States District Court for the Northern District of Alabama.) I understand you to be particularly concerned about the following language in the Court of Appeals opinion (715 F.2d, 999,1019):

"Ordinarily, we would therefore allow Judge McFadden's reinstatement of Judge Pittman's initial order respecting the Egles' Maryland home to stand. However, we see no evidence in the record as to either the extent of Mrs. Egle's interest in the home (i.e., what percentage of any amortization and of any improvements were made during the marriage) or the fair market value (in

1980, at the time of Judge Pittman's initial order) of the property. Not being in a position to determine the fairness of the exchange (at the time it was first ordered), we reverse Judge McFadden's reinstatement of Judge Pittman's order regarding this property, and we leave the parties to pursue whatever remedies are available to them in Maryland for the resolution to their respective interests in the property."

Your question, as I understand it, is whether I took into consideration all of the equities in the property division prior to reinstating the provision. The answer is yes. In fact, I thought the provision was generous to the wife.

My first trip to the Canal Zone was in January of 1980. A pretrial custody motion in the Egle case was on the docket. I resolved the custody question

after a very extensive hearing. Thereafter, later in the year, Judge Pittman, the Chief Judge from the United States District Court for the Southern District of Alabama, visited the Canal Zone and heard the divorce case. In a series of opinions and orders he granted the Plaintiff an Interlocutory Decree of Divorce and set forth alimony, child support and other provisions normal to a divorce decree. Judge Pittman also set forth a plan for the division of personal property, and finally ordered the transfer of Mrs. Egle's interest in the house in Maryland to the husband upon the payment of $10,000 to the wife. Judge Pittman later supplemented his first order to set aside the provision dealing with the Maryland real estate on the grounds that the community property laws of the Canal Zone did not apply to real estate out-

side the Canal Zone.

I returned to the Canal Zone in June of 1981 and found on my docket several motions in the Egle matter, including one for a final decree. I entered a final decree of divorce nunc pro tunc to May 8, 1981.

I heard the matters in a preliminary way, and by agreement of the parties, continued them to be heard further in the courthouse for United States District Court for the Southern District of Florida. That hearing was held in September of 1981. In the interim, I had appointed a guardian ad litem for the children. The parties were still at odds with respect to the division of personal property and Judge Pittman's plan was still not in effect. With my concurrence, a resolution was made of the personal property by the parties

under the supervision of a neutral third party and upon his certification to me, this decision was incorporated into the final orders issued to dispose of all outstanding issues.

I was concerned with the jurisdiction of the Court in the Canal Zone to dispose of real estate in Maryland as well as the question of the applicability of the Canal Zone laws, but concluded that the Court had jurisdiction and that the Canal Zone laws applied, permitting the Court to arrive at a fair and reasonable distribution of all of the property of the parties. I, therefore, decided that Judge Pittman had been wrong in setting this original order aside, and reinstated his Order for a transfer of the wife's interest in the Maryland home to the husband upon the payment of $10,000.

Judge Pittman's orders contained detailed provisions for the disposition of retirement benefits, insurance proceeds, furniture, savings accounts and other matters. It appeared to me that he had made a very careful analysis of the equities with respect to the Maryland property, because I thought it was fair to the wife under all the circumstances and in an effort to bring the matter finally to rest.

Judge Pittman stated in his original findings dated July 18, 1980:

"At the time the parties were married, the husband brought into the marriage one-half interest in the Maryland home, which was partially furnished, one lot, and $2,500 in cash.

The wife brought into the marriage no cash savings, a grand piano later sold for $900, a washing machine, two

wicker chairs and a wicker table, two Easter baskets (sentimental value), and her father's drafting table. * * * At the time the parties separated, they had accumulated furniture which included many collector's items valued at from sixty to one hundred thousand dollars, approximately 258-270 pieces of Tiffany silver purchased in 1973 for approximately $5,600, which includes twelve place settings of flatware and serving pieces. The court takes judicial knowledge that there has been a large increase in the value of silver since that time.

All the savings and band accounts were as follows: $2,188 in Miami banks, $579 in Panama savings, and in Maryland. The husband has an outstanding loan against an insurance policy, New York Life, of $3,888.68 and two car payments

as of June 18, 1980, $888.48. He owns a 1979 GMC truck, a 1975 GMC truck, a 1971 Cadillac, and a 1960 Cadillac. The two Cadillacs are of little monetary value.

The husband has a retirement fund with the value as of January 1980, of $34,003.22 He pays approximately seven percent of his gross salary into this each pay period, which is currently running about $134.00 every two weeks. This will not be a lump sum payable upon retirement. If he were to retire at this time, he would draw fourteen to fifteen hundred dollars a month. He is fifty-five years of age. * * * He has three insurance policies as follows: United Benefit Life Insurance, $30,000, payable to the wife; New York Life Insurance, $10,000, payable to the two children;

New York Life Insurance, $15,000, payable to the children, which has a $3,886.68 loan outstanding payable to this life insurance policy.

The court has advised the parties that the furniture and silver is to be divided on the following plan: by lot the wife's name was drawn. She is to make an equal division of the furniture together with identifying numbers which are on the furniture and present that to the husband within thirty days from June 18. The husband may choose the furniture on either list. This must be done not later than sixty days from June 18, or thirty days after the receipt of the list from the wife, whichever date is earlier.

The husband is to make an equal division of the Tiffany silver and deliver the list of the division to the

wife within thirty days from June 18, 1980. The wife may choose the silver from either list and advise her husband within thirty days after the receipt of the list.

There is in the Maryland home some furniture which the husband had at the time of the marriage and various items of linen, cooking utensils, etc., accumulated during the marriage. This is in addition to the "collector's item" furniture.

There are also pieces of furniture, linen, glassware, cooking utensils, etc., acquired during the marriage in addition to the "collector's item" furniture. The husband should inventory the household goods in the Maryland and Coco Solo homes, making two lists dividing these household goods. the wife may choose either list. The

husband will ship the items to whatever address she gives him in Miami, Florida, freight prepaid. He should submit the lists within 90 days of the date of this decree. She should make a selection within thirty days thereafter. The husband has six months in which to arrange the shipment since the household goods are located in Panama and Maryland.

The husband should also ship to the wife those items of personal property stored in the garage in the Maryland home which she brought to the marriage.

The husband is to retain possession of the trucks and automobiles. Within three months from the date of this decree, the husband is to pay to the wife $4,000 for her use in purchasing an automobile.

The wife incurred the expense of $1,446.50 for the transportation of furniture from Maryland to Miami, including one month's storage charge. The court finds that the wife has unnecessarily incurred expenses in transporting this furniture and storing it. The furniture could have been left in the Maryland home where there would be no storage charges and no transportation charges for his share of the property. The husband is to pay the wife one-half of these charges, or $723,25, within three months from the date of this decree.

As a further and complete settlement of community property claims against the husband, the husband is to pay the wife on or before one year from the date of this decree $10,000 upon her delivering to him her interest in the Maryland

home."

This was a obviously carefully thought our division of property, taking into consideration all of the factors. Judge Pittman also noted:

"At the time she left their home in Maryland and secreted herself and children, or shortly thereafter, she withdrew all of their checking funds from three Miami banks totaling $2,188.26. She withdrew from a safety deposit vault 170 pieces of Tiffany silver purchased in 1973 at a cost of approximately $3,853.00, and she took many valuable pieces of furniture which she and the husband had painstakingly collected during their marriage. Both parties claim this furniture to be "collector's items." She subsequently stored them without advising the husband of their whereabouts. There was a

bank account in Maryland untouched. There are approximately 88 to 100 pieces of silver in the Canal Zone home. Some of the "collector's item" furniture was left in both Maryland and the Canal Zone."

Certainly, in reviewing and reinstating his order, I thought the equities weighed heavily in favor of the husband having the home and the $10,000 was, in my judgment, generous taking into account all of the factors involved including the division of the other property. I have no clear recollection of the precise interest she had in the property or how it was obtained. My memory is that I did know at the time of the hearings and decision. I also believe that she did not pay anything for any such interest and I believe the evidence was that she had

not worked during the marriage.

I do not have a record of the proceedings before Judge Pittman and, of course, my recollection could be faulty. I shall attempt to answer any questions you or Mrs. Egle's counsel, or the Court might have.

Very truly yours,

Frank H. McFadden

FHMcF/jg

Enclosures

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE CRISTOBAL DIVISION

August J.C. Egle — Civil Number

vs. — 79-3348-C

Ann E. Schraedel Egle — Clerk's Certificate

I, Sarah Belzer, Deputy Clerk for the United States District Court for the District of the Canal Zone, do hereby certify that the foregoing contains the full, true and complete record and proceedings in the above-captioned case.

I further certify that the Transcript of Proceedings will be filed at a later date and sent forward at that time.

I further certify that the Plaintiff's and Defendant's Exhibits received in evidence on June 16, 17 and 18, 1980 and Defendant's Exhibits received in

evidence on September 24 and 25, 1981 are enclosed in Volume IV.

I further certify that the docket entries contained herein are true and correct copies of the docket entries on file in this Court.

In witness whereof, I have hereunto set my hand and affixed the Seal of this Court, at Ancon, Republic of Panama, this first day of February, 1982.

Office of the Clerk of Court

By Sarah Belzer
Deputy Clerk

(S E A L)

UNITED STATES DISTRICT COURT

DISTRICT OF THE CANAL ZONE

OFFICE OF THE CLERK OF COURT

PSC Box 2006

APO miami 34002

February 2, 1982

Hon. Gilbert F. Ganucheau

Clerk, U. S. Court of Appeals

Fifth Circuit

600 Camp Street

New Orleans, Louisiana 70130

Re: CV 79-3348-C Egle -vs- Egle

Dear Sir:

Enclosed please find the original record in the above-catpioned case, Volumes I through IV.

The Transcript of Proceedings has not been filed in this Court. When it is received, it will be sent forward with updated copies of the docket entries.

Please acknowledge receipt by re-

turning the enclosed copy of this letter.

Sincerely,

Sarah Belzer

Deputy Clerk

Enclosures

cc: Mr. Neil Flaxman

Mr. Michael Pierce

Mr. Edward C. Vining, Jr.

Mr. Albert J. Joyce, Jr.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Ann E. Schraedel Egle — Defendant-Appellant

-vs-

August J. C. Egle — Plaintiff-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF THE CANAL ZONE

PLAINTIFFS

EGLE, August J. C.

ATTORNEYS

Albert J. Joyce, Jr.

Box 615

Balboa, R. P.

DEFENDANTS

EGLE, Ann E. SCHRAEDEL

ATTORNEYS

Neil Flaxman

FLAXMAN & FLAXMAN

2600 Douglas Road, Suite 1207

Coral Gables, Fla. 33134

Pierce & Kiyonaga

P.O. Box 605

Balboa, R. P.

CAUSE

Complaint for Divorce - Title 8, §111 CZC

DOCKET ENTRIES

8/13/79	Complaint, fld.
8/13/79	Summons issued and handed to U.S. Marshal.
8/15/79	U.S. Marshal's return, showing service had on 08-13-79, filed.
8/16/79	Answer, fld.
8/28/79	Certificate of Service, fld.
9/6/79	Stipulation (Answer to Counter-claim), Plaintiff has additional period of time in which to file his answer to "COUNTER-CLAIM" fld on Aug 16, 1979, having until September 20, 1979 in which to file his response to said counterclaim, fld.
9/20/79	Answer to Counterclaim for Divorce fld.
10/11/79	Pltff's signed Affidavit in support of Pltff's Motion for

pendente lite custody of his two minor sons, fld.

10/22/79 Deft's Notice of Taking Deposition of Pltff on Nov 7, 1979 at 2:30 p.m. Offices of P & K, U.S. Dist. Ct, Ancon, Panama.

10/23/79 Pltff's Notice of Taking Deposition of Deft on Nov 21, 1979 at 4:00 p.m., Offices of A.J. Joyce, Jr., 3rd Flr, District Courthouse, Ancon, Rep de Panama

10/29/79 Pltff's Notice of Motion and Motion for Custody Pendente Lite.

(HEARING: November 30, 1979 at 9:00 a.m.)

10/31/79 Notice case set for TRIAL wk of Nov 12, 1979 at 9:00 a.m.

11/10/79 MIN: Continued to Nov 30, 1979

for hearing Pltff's Motion for Pend. Lite Custody.

11/14/79 MIN ENTRY of Judge M.L. Sear cont'd to 12/10/79 for hrg OSC or Dismissal.

11/28/79 Deft's Memorandum of Law for granting Motion for Continuance pursuant to CZC 5 § 2684 and Rule 40 FRCP.

11/28/79 Deft's Motion and Notice for Continuance of the Pltff's Motion for Custody pendente lite until mid-January, 1980 w/Exhibits 1 thru 5 attached in support thereof attached.

11/30/79 MIN: Continued to January 11, 1980 for hearing Pltff's motion for custody pendente lite.

12/3/79 ORDER that case be continued to January 7, 1980 for TRIAL.

12/3/79 Notice case set for Hearing Motion for Custody Pendente Lite on Jan 11, 1980.

12/10/79 MIN ENTRY of Judge Sear con'd to January 11, 1980 for hearing mtn. for custody pendente lite.

01/11/80 M.E. Hrg. on Pltff's Mtn for Pendente Lite Custody. Pltff Ex 1 Medical Report 2-Group of 4 papers rec'd in evidence. Deft Ex A Employee Statement rec'd in evidence. Hearing had; Rule invoked. Both sides present 6 witnesses. Arguments had. Temp. custody gtd to Deft on condition she return to former CZ area in 14 days to reside in qtrs furnished at Pltff's expense. Fourteen day period to commence

Jan 14, 1980. Pltff gtd reas right of visitaiton as per conditions set out by the Court. Pltff to pay deft $350.00 per pay period for child support and provide Deft with one vehicle for her use. Pltff to maintain deft and both minors on hospital insurance plan. Court defers ruling on pendente lite atty fees. Agreed Order to be submitted.

01/14/80 ORDER, (F.H. McFadden), 01/11/80).

01/21/80 INTERROGATORIED PROPOUNDED TO PLAINTIFF to be answered within 30 days.

01/23/80 TRANSCRIPT of Court's Order on Petitioner's Motion for Custody Pendente Lite.

01/28/80	Ltr, Housing Mgr, PCC request of pltff. for provisional housing forwarded to higher authorities. 01/15/80.
02/20/80	Deposition of Ann E. Schraedel Egle, taken by pltff, 01/10/80.
03/07/80	Pltff's Answer to Interrogatories
03/31/80	Pltff's Interrogatories Propounded to Deft.
04/17/80	Deft-Counterclaimant's Mtn. to Amend Counterclaim.
04/17/80	Deft-Counterclaimant's Memo in suppt of Mtn. To Amend Counterclaim.
04/17/80	Deft-Counterclaimant's AFFADAVIT in suppt of Mtn. to Amend Counterclaim.
04/21/80	Deft's Answer to Interrogatories.
04/22/80	Notice case set for trial week

of 06/09/80 mailed to attys. Joyce & Pierce.

05/20/80 Deft's Designation of Michael Pierce as Trial Counsel.

05/21/80 Pltff's Motion to Compel Deft Answers to Interrogatories (Rule 37 (a) (2) (3) (4) w/ Affidavit and Memorandum of Law attached.

05/21/80 Pltff's Motion for Continuance, w/signed Affidavit of Pltff A.J.C. Egle and Memorandum of Law attached.

05/29/80 Deft's Opposition to Pltff's Motion to Compel Answers to Interrogatories pursuant to Local Rule 103.6.

05/29/80 Deft's Opposition to Pltff's Motion for Continuance pursuant to Local Rule 104.

06/06/80 ORDERED that Pltff's Motion

for Continuance be DENIED. (MLS) 06/02/80

06/06/80 ORDERED that Pltff's Motion to Compel Deft. to Answer Interrogatories be DENIED. (MLS) 06/02/80.

06/10/80 ORDERED that Deft's Counterclaimant's Motion to AMEND submitted on 04/17/80 be AMENDED as follows: DELETE under the prayer for relief in its entirety: DELETE Para 3; DELETE Para 4; DELETE Para 6, ADD Para 6; DELETE the last 2 sentences in PARA 5, ADD, Therefore, the Deft requests the sum of $1,000.00 per mo permanent alimony. In addition, she will require the sum of $350.00 per mo per child for the support of her 2

children. (MLS) 06/05/80.

06/11/80 Ltr from Pierce & kiyonaga requesting subpoina be issued & served on Betty Fetherstone. Issued and handed to U. S. Marshal Gogins for service.

06/16/80 M.E. (06/16/80) Trial commences. Rule invoked. Pltff presents 2 witnesses. Pltff Exhibits 1 to 3 are rec'd in evidence. Deft's Exhibits 1 to 5 are rec'd in evidence. Cont'd to June 17, 1980 at 9:00 A.M. for further trial. (V. Pittman)

06/17/80 M.E. (06/17/80) Trial resumes. Pltff presents 3 witnesses, & rests. Deft. testifies in her own behalf. Deft Exh 6 to 12 are rec'd in evidence. Cont'd to 06/18/80 at 9:00

a.m. for further trial.

06/18/80 M.E. (06/18/80) Trial resumes. Deft presents 5 witnesses. Deft Exhibits 13 to 16 are rec'd in evidence. Pltff Exhibit 4 is rec'd in evidence. Defense rests. Pltff testifies in rebuttal. Both sides waive argument, and the case is taken under advisement.

06/26/80 M/R shows service executed on Subpoena for Betty Fetherston on 6/18/80 at 11:00 a.m.

07/22/80 Opinion and Order (Findings of Fact/Conclusions of Law) (Virgil Pittman) 07/22/80.

08/08/80 LIST "A" & "B" of Furniture owned by Deft & Pltff.

08/19/80 Supplemental Findings of Fact and Conclusions of Law (08/15/

80) (PITTMAN)

09/23/80 Pltff's Motion to Modify Interlocutory Decree w/Pltff's signed Affidavit.

10/03/80 Parties Stipulation to Extend time to Deft until October 10, 1980 to reply to Pltff Motion which was fld on Sept 23, 1980.

10/06/80 ORDER appointing U.S. Maginstrate as Special Master pursuant to FRCP, Rule 33, Mag. Ray J. McQuary, to hear such petitions as may be filed by the parties concerning this Court's orders relative to the division of the household goods & silverware as set out in this court's orders dated July 18, 1980 & August 15, 1980, including the monitoring

of the division. The special master's authority is limited to the division of the household goods and silverware. (U.S. District Judge Virgil Pittman) 09/29/80.

10/10/80 Counsel for the Parties Stipulation to Extend Time that Deft be given until October 17, 1980 to reply to the Pltff's motion which was filed on September 22, 1980.

10/14/80 Notice case set for Hearing on Division of Property on October 20, 1980 at 9:00 a.m. before Special Master Ray J. McQuary; mailed to Attys A.J. Joyce & Michael Pierce.

10/21/80 Deft's Reply to Motion to Modify Interlocutory Decree.

10/22/80 Pltff's Motion of 09-23-80 to

Modify Interlocutory Decree DENIED. (Judge Virgil Pittman) 10/08/80.

10/22/80 AMENDED INTERLOCUTORY DECREE. Order hereby amends Order nunc pro tunc July 18, 1980, and adds the following order: ORDERED, ADJUDGED & DECREED, that when 6 mos fr the date of entry hereof shall have elapsed & the parties hereto are both alive & unreconciled the one with the other & there is no appeal or motion to set aside pending & undertermined, the Pltff, AUGUST J.C. EGLE, upon applicaiton & Final Decree of Divorce cancelling & dissolving the bonds of matrimony binding the Pltff to the Deft, & thus, restoring

them, & EACH OF THEM, to the status of single, unmarried persons. (Judge Virgil Pittman) 10/08/80.

10/27/80 Notice case set for Hearing on Division of Property on October 20, 1980 is continued generally; mailed to Attys A.J. Joyce, Jr., & M. Pierce.

10/30/80 Pltff's Motion for Relief from Adverse Order (Rule 60(b), FRCP, w/Affidavit & Memorandum of Law attached.

02/05/81 Copy of letter from Atty. Joyce to Atty. Pierce in reference to the executory provisions of the Orders in the Egle Case.

04/09/81 Pltff's List of "Household/ Personal Efforts" re Ct Order Division of goods.

05/08/81 Pltff's Application for Final Decree of Divorce.

05/11/81 Notice case set for Hearing on June 15, 1981 at 9:00 a.m.; mailed to Attys Albert J. Joyce, Jr. and Michael Pierce.

05/18/81 ORDERED that Pltff's Motion Interlocutory Decree" fld on Sept 23, 1980 is redocked and is set for hearing during the wk of June 15, 1981, and, ORDERED that the Order of this ct dtd Oct 8, 1980 is hereby rescinded. (V. PITTMAN) 05/12/81.

06/05/81 Pltff's Notice & Information to the Court that Deft fld in another jurisdiction-Circuit Ct of the 11th Jud. Cir., Dade City, Fla in the City Miami. Documents fld were Motion for

Enforcement & Modification of Judgment & Request for Declaration of Rights; Notice of taking Pltff's Deposition in Miami, Fl. on 7/16/81; & Notice of Hearing to Pltff in Miami, Fl, on Petitioner's (Ann E. Schraedel Egle) Motion for Enforcement & Modification of Judgment & Request for Declaration of Rights. (Copy of Documents fld attached to Pltff's Notice).

06/10/81 Pltff's AMENDED Motion to Modify the Interlocutory Decree w/Addendum and signed Affidavit by Pltff & Memorandum of Law in support of Motion to Modify.

06/11/81 M.E. (06/11/81) Ordered to show cause or dismissal on June 16, 1981 at 9:00 a.m.

(MagMcQuary).

06/11/81 Pltff's Notice as to why Pltff has made NO "LIST" Selection to date.

06/12/81 M.E. (06/12/81) Attys for the Pltff & Deft appeared & announced ready for trial. Case is No. 6 in order of priority for trial for week of June 15, 1981. (MagMcQuary)

06/12/81 Deft's Answer to Order to Show Cause.

06/15/81 Deft's Opposition to Pltff's Motion.

06/15/81 Pltff's Reply to Order to Show Cause.

06/18/81 Pltff's Supplemental Memorandum of Law.

06/19/81 Sterling Silverware List "A" & "B" compiled at Coco Solo, Panama on 7/14/80. Deft. chose

List "A".

06/19/81 Report of Special Master, Ray J. McQuary, with Findings of Fact and Conclusions of Law with Furniture Lists "A" & "B", attached.

06/19/81 Final Decree of Divorce w/ attachments of Opinion & Order of July 18, 1980, Supplemental Findings of Fact & Conclusions of Law dtd August 15, 1980 and the Amended Interlocutory Order dtd October 8, 1980. (Judge Frank H. McFadden) 6/19/81.

06/22/81 ORDERED that Pltff Mtn set aside $500. every two wks, set aside; that Mtn set aside deft's rights to retirement fund, DENIED; MTN set aside award of $723.25 payable to deft re costs of transporting furni-

ture etc., held in abeyance; that pltff pay deft bal of $4,000. as ORDERED as paymt to deft by pltff for car, or $2,000. within 3 wks.; that MTN modifying provisions final decree & Inter. Dec. for disposition of home in Glen Burnie, Md is DENIED & provisions remain as is; that pltff & deft meet in Miami, on/about 07-15-81 with a disinterested 3rd pty for division of household goods; that no ruling by Court as Pltff's Mtns for visitation rights until Court receives report of Guardian to-be-apptd.; that parties, with asst. of attys, report to this Court on/about 07-06-81 as to mu-

tually agreeable Guardian & if Guardian not chosen, the Court will appoint one; that Pltff be available in Miami, Fla. on/about 07-14, 15-81 for interview by court-apptd Guardian; that Pltff provide Court with copies of bi-weekly receipts for months Jan. '81 thru May '81, copies to be provided within 7 days of Pltff's return to Panama in July, 1981 & that deft's req. for atty's fee DENIED; & this matter continued for hearing & decision, until further ORDERS of this Court. (F.H.McFADDEN).

06/22/81 M.E. (06-22-81) Hrg commences. Witness Sworn. Crt enters Final Decree of Div.

& an ORDER for continuing provisions. (F.H.McFADDEN.)

06/24/81 Pltff's rptr to Crt re Litigatn of Deft in Miami. (Cpy mld to J.McFadden/06-24-81)

07/06/81 Cpt Ltr. fr Atty Joyce to Atty Pierce re: mutually acceptable guardian for chldrn. (Mailed to J.McFadden -07-06-81.)

07/13/81 ORDER that Deft cease & desist litigation of Case No. 79-14825, Cir. Crt. of 11th Jud. Cir. in & for Dade Cty, State of Fla. & Case No. 79-14825 FC 12, Cir. Crt. 11th Jrd. Cir, Family Div. Dade Cty, State of Fla. (Sgn. 07-06-81 by J. F.H. McFADDEN.)

07/14/81 ORDER apptg. BRENDA ABRAMS

of ABRAMS & ABRAMS, P.A. Penthouse 10, Dadeland Towers, 9400 S. Dadeland Blvd., Miami, Fla. 33156 (305) 666-3383, as guardian ad item for two minors, Eric & Anders Egle, to be available at all reasonable times & places. Fee to be taxed against parties to this action to be determnd at later date. (Sgnd. 07-10-81 by Jdg. F. H. McFADDEN.)

07/21/81 Pltff's Report of Death threat while in the U.S.A. at Pan-American Hotel, Miami Beach.

07-21-81 Pltff's Report of Death Threat while in the U.S.A. at Pan-American Hotel, Miami Beach.

07-21-81 Pltff's Request to Deft to

	Return Official Passports of minor sons, Eric Alexander & Anders Christopher Egle.
07/23/81	Pltff's copies of bi-weekly pay receipts as per Crt ORDER 06-22-81 (F.H.McFADDEN)
08/13/81	Copy of Pltff's letter to Mrs. Brenda M. Abrams detailing work/leave schedule until Jan. 16, 1982. (Copy sent to Judge McFadden, 08-28-81).
08/28/81	Copy of Ltr of Pltff's Atty to Deft's Atty inquiring if the civil action of the Deft filed in Fla. has been dismissed as per ORDER of 07-06-81 by J. McFadden.
09/10/81	Pltff's Request for Mutual Psychiatric Exam of both parties.

09/11/81 Copy of Pltff's Letter to Deft's Atty with address change of deft. and/also questioning whereabouts of Stickley furniture. (copy mailed to J. McFadden 09-11)

09/11/81 Pltff's MTN/Petition for Imposition of Sanction against Deft., Finding of Contempt. (mailed to J. McFadden 09-11-81).

09/16/81 Stip by Pltff & Deft to hearing in Miami, Fla. at U.S. Courthouse Bldg. on 09-24-81 at 9:00 A.M. before the Hon. Frank H. McFadden. (mailed 09-16-81)

09/17/81 Pltff's 2nd Notice of Deft's Violation of Intentions of the Court & its ORDER. (Mailed to J. McFadden

09-17-81).

09/17/81 Pltff's MTN to Modify Final Decree & Set aside Report of Special Master, with supporting AFFDVT of Pltff (filed 09-15-81) and Memo of Law. (mailed to J. McFadden 09-17-81.)

09/28/81 Deft's REPLY to MTN to MODIFY FINAL DECREE & SET ASIDE REPORT of SPECIAL MASTER. (Filed in Open Court -09-24-81 F.H.McFADDEN, U.S. D.J. Miami, Fla.)

09/28/81 Deft's REQUEST for ATTORNEYS' FEES & MODIFICATION & CLARIFICATION of SUPPORT/ALIMONY. (Filed in open Court-09-24-81, F.H.McFADDEN, U.S.D.J., Miami, Fla.)

09/28/81 Deft's MTN to STRIKE. (Fld

open Crt 9/24/81, McFADDEN, USDJ, Miami, Fla.)

09/28/81 Deft's TRIAL CATALOGUE. (Fld open Crt 9/24/81, McFADDEN, U.S.D.J., Miami, Fla.)

09/28/81 Deft's Memo in SUPPORT of REQUEST for APPLICATION of FLORIDA LAW & MTN to STRIKE SANCTIONS for INSTITUTING FLORIDA PROCEEDINGS. (Filed in open Court-09-24-81 F.H. McFADDEN, U.S.D.J., Miami, Fla.)

09/28/81 Deft's Exhibits #1,2,3 admitted at Hrg 09-24-81, Exh. #4 admitted 09-25-81. (Filed in open Crt F.H.McFADDEN, U.S.D.J., Miami, Fla.)

10/07/81 Pltff's Submissions of P.C. CODE Provisions Re Custody Award. (cpy mailed to J.

McFadden, 10-08-81.)

10/20/81 Deft's Affdvt in support of MTN for ATTY'S Fees. (Mailed to J. McFadden 10-26-81).

12/19/81 ORDER (12-14-81 McFADDEN) that property of parties shall be divided in accordance with list attached & incorporated by reference & that all other orders of court in conflict are withdrawn & of no effect & further ORDERED that Pltff's MTN to set aside report of Sp. Master dated 06-19-81 is overruled as moot. Attached is Certificate of EDWARD C. VINING, JR. Re: Division of Personal Property, hand-written letter

from REVEREND RONALD H. SCHUETTE attesting to the division of property lists initialed by Pltff & Deft numbering S-1 through S-13; G-1 through G-14, one (1) hand printed page, both sides of division of Tiffany Siver-ware & initialed & 10 xeroxed pages of additional des-criptions & deletions.

12/19/81 ORDER (12-15-81 McFADDEN) that Pltff's MTN for physciatric examination of both parties is DENIED.

12/19/81 ORDER (12-15-81 McFADDEN) that MTN to SET ASIDE award of sum of $723.25 payable by Pltff to Deft for cost of transporting furniture & household items from

Baltimore, Md. to Miami, Fla. is DENIED.

12/19/81 ORDER (12-15-81 McFADDEN) on Deft MTN for atty's fees for modification & clarification of support & alimony provisions of divorce decree is DENIED.

12/19/81 ORDER (12-15-81 McFADDEN) on Deft's MTN to Strike pleading called Death Threat to Pltff & MTN requesting that Pleading entitled Report to Court Re Miami Litigation also be struck. MTN is DENIED.

12/19/81 ORDER (12-15-81) McFADDEN) that Pltff pay the sum of $2,524.63 as fees & expenses to the court appointed Honorable Brenda Abrams as guardian ad litem for minor

children, 90 days after January 1, 1982.

12/19/81 ORDER (12-15-81 McFADDEN) that the divorce decree is modified granting custody of children to father & they are to be delivered as soon after Jan. 14, 1982 as possible & that the mother/wife have custody during summer vacation, 2 wks after school closes & returned 2 wks before school opens & mother have custody every other Christmas as in original decree. Also, mother to have visitation rights for 48-hour period, commencing Fri. afternoon to Sun. night any weekend she chooses to be in vicinity of residence of

father & children with due regard to academic & extra curricula activities of children. Should father be in States with children, he is to notify deft. & permit visitation rights 48 hours of each week while in States. Pltff father shall pay costs of transporting children to & from U.S. for summer vacation & during alternate Christmas vacation. During the summer, provide sum of $500. every two weeks for support, otherwise all provisions for child support are rescinded. Deft. shall receive $250. every two weeks in alimony until Jan. 1, 1983 at which time alimony will

end.

12/19/81 ORDER (12-16-81 McFADDEN) that the modification Orders of Aug. 19, 1980 & June 22, 1981 be set aside & the original ORDER of July 18, 1980 be reinstated providing that the Pltff shall deliver to Deft within one year of date of this Order (12-19-81) the sum of $10,000. & Deft deliver to Pltff in exchange a quit claim or appropriate deed conveying to him her interest in Glen Burnie, Md. property.

01/12/82 Deft's Notice of Appeal from ORDERS 1. granting custody of minor children to Pltff; 2. denying payment of monies to Deft; 3. denying Deft's

request for legal fees; 4. compelling Deft to convey real property to Pltff.

01/12/82 Deft's Notice of Filing of Notice of Appeal. (a/c to counsel of both parties Crt. Reporter, & 5th CCA with c/c docket entries.)

01/26/82 Copy of Court Reporter's APPEAL INFORMATION SHEET.

02/01/82 Clerk's Certificate. (With Record to 5th CCA.)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE CRISTOBAL DIVISION

AUGUST J.C. EGLE

VS Case No. 79-3348-C

ANN E. SCHRAEDEL EGLE

NOTICE

TO: ALBERT J. JOYCE, JR.

MICHAEL PIERCE

Take notice that the above-entitled case has been set for TRIAL on WEEK OF JUNE 9, 1980 AT 9:00 A.M. at the U.S. District Court, BALBOA Division, before the Honorable CHIEF JUDGE VIRGIL PITTMAN.

Dated: April 22, 1980

Doris L. McCellan

Clerk of Court

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE CRISTOBAL DIVISION

MINUTES OF TRIAL OR HEARING

August J.C. Egle CASE NO. 79-3348-C

vs. DATE: June 14, 1980

Ann E. Schraedel Egle

HON. VIRGIL PITTMAN Presiding

Nature of Hearing Divorce Pres Serv.

Answer filed 8/16/79

APPEARANCES

PLAINTIFF:	DEFENDANT:
Albert J. Joyce, Jr.	Michael Pierce

PLAINTIFF'S WITNESSES:

August J.C. Egle Exam'd(x)

Cross Exam'd(x)

Richard Schuler Exam'd(x)

Cross Exam'd(x)

DISPOSITION: Trial commences. Rule invoked. Pltff presents 2 witnesses.

Pltff Exhibits 1 to 3 are rec'd in evidence. Deft's Exhibits 1 to 5 rec'd in evidence. Cont'd to June 17, 1980 at 9:00 A.M. for further trial.

Sue Robbins Reporter

_____ Deputy

DORIS L. McCLELLAN,
Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE CRISTOBAL DIVISION

MINUTES OF TRIAL OR HEARING

August J.C. Egle CASE NO. 79-3348-C

vs. DATE: JUNE 17, 1980

Ann E. Schraedel Egle

HON. VIRGIL PITTMAN Presiding

Nature of Hearing Divorce-Personal Service

APPEARANCES

PLAINTIFF:	DEFENDANT:
Albert J. Joyce, Jr.	Michael Pierce

PLAINTIFF'S WITNESSES:

Henry G. Seeley — Exam'd(x)

Cross Exam'd(x)

Thomas S. Clark — Exam'd(x)

Florence McDonald — Exam'd(x)

Cross Exam'd(x)

DEFENDANT'S WITNESSES:

Ann E. Schraedel Egle Exam'd(x)

Cross Exam'd(x)

DISPOSITION: Trial resumes. Pltff presents 3 witnesses, and rests. Deft testifies in her own behalf. Deft Exhibits 6 to 12 are rec'd in evidence. Cont'd to June 18, 1980 at 9:00 A.M. for further trial.

Sue Robbins Reporter

_____ Deputy

DORIS L. McCLELLAN,
Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE CRISTOBAL DIVISION

MINUTES OF TRIAL OR HEARING.

August J.C. Egle CASE NO. 79-3348-C

vs. DATE: JUNE 18, 1980

Ann E. Schraedel Egle

HON. VIRGIL PITTMAN Presiding

Nature of Hearing Divorce-Personal Service

APPEARANCES

PLAINTIFF:	DEFENDANT:
Albert J. Joyce, Jr.	Michael Pierce

DEFENDANT's WITNESSES:

Ann E. Schraedel Egle Cross Exam'd(x)

Arden L. Cook Exam'd(x)

Cross Exam'd(x)

June Bellafato Exam'd(x)

Betty Fetherston Exam'd(x)

Cross Exam'd(x)

Charles O. Barrett Exam'd(x)

Cross Exam'd(x)

DISPOSITION: Trial resumes. Deft presents 5 witnesses. Deft Exhibits 13 to 16 are rec'd in evidence. Pltff Exhibit 4 is rec'd in evidence. Defense rests. Pltff testifies in rebuttal. Both sides waive argument, and the case is taken under advisement.

Sue Robbins Reporter

_____ Deputy

DORIS L. McCLLAN,

Clerk

UNITED STATES OF AMERICA

CANAL ZONE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE CRISTOBAL DIVISION

AUGUST J.C. EGLE

Plaintiff

vs. No. 70-3348-C

ANNE E. SCHRAEDEL EGLE SUBPOENA

Defendant

To Betty Fetherston - Margarita Community Health Center, Margarita, Panama, R.P.

YOU ARE HEREBY COMMANDED TO APPEAR before this Court at the Courthouse at Ancon, Canal Zone, on the 12th day of June, 1980, at 9:00 o'clock in the morning of said day, then and there to testify for the defendant-professional contact with the person is requested

in the above-entitled action.

Fail not under penalty of the law.

DORIS L. McCLELLAN

Clerk of Court

By _____

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF THE CANAL ZONE

CRISTOBAL DIVISION

AUGUST J. C. EGLE

VS Case No. 79-3348-C

ANN E. SCHRAEDEL EGLE

OPINION AND ORDER

August J. C. Egle (husband) filed a complaint seeking a divorce in this court August 13, 1979. The complaint set out the jurisdictional averments and stated that he and his wife were married September 3, 1960, and separated August 5, 1979. It also alleged that two boys were born of this marriage: Erik, born December 2, 1969, and Anders, born November 3, 1974. It requested a division of community property and sought a divorce on the grounds of "extreme cruelty toward the

Plaintiff involving the infliction of grievious mental and physical suffering . . ." together with details.

He also sought the custody of his two minor sons.

Ann E. Schraedel Egle (wife) answered and then filed an answer and counterclaim. She charged the husband with being cold, indifferent, unresponsive, and with having abandoned her bedroom. She seeks the custody of the two children, alimony, and support. There have been amendments filed in which attorney's fees are sought.

FINDINGS OF FACT

Part One

The plaintiff is over twenty-one years of age and is a citizen of the United States of America. He has been a continuous resident of the former

Canal Zone since June 1, 1978, to the present time and resides at House No. 249-D, Coco Solo, Republic of Panama. He is employed as a pilot with the Marine Bureau of the Panama Canal Commission.

The defendant is over twenty-one years of age and is a citizen of the United States of America. She is a resident of the former Canal Zone residing at House No. 249-D, Coco Solo, Republic of Panama. She is presently unemployed but possesses two years of college credit.

The parties were married on September 3, 1960, at Miami, Florida, and became separated on August 5, 1979. The time that elapsed from the date of their marriage to the date of separation was eighteen years, eleven months, and two days. There have been two children

born of the marriage of the parties; namely, Erik Alexander, age ten, born December 2, 1969, and Anders Christopher, age five, born November 30, 1974.

The parties' principal place of residence is the Canal Zone where the husband works. The parties also have a home in Glen Burnie, Maryland, his boyhood home place. The wife and the children were visiting in the United States at the home place in June, 1979. The husband was there and nothing was said about a separation or divorce. The husband returned to the Canal Zone in connection with his duties as a ship pilot making transits through the Panama Canal. The husband attempted to reach the wife by telephone from the Canal Zone before again traveling to Glen Burnie. The children answered and said the mother was out. He told

them he was coming to the States the next day and asked that the mother return the call. She did not. The next night, the husband arrived at the airport near Glen Burnie in the late evening hours. No one was there to meet him. He called the home and received no answer. When he arrived at the home by taxi, no one was there and there was no message. He later found a letter in the mailbox from the wife's attorney telling him that his wife was considering a divorce. No address or information was given as to where the wife and children could be found. The husband also found certain items were missing from the home and a number of unpaid bills were there. After futile efforts to locate the wife and children he returned to the Canal Zone.

He had discussed his marital problems with the vicar of his Canal Zone church during this interval. Through the vicar he ascertained that the wife was returning to the Canal Zone August 13. She had told the vicar not to tell anyone, but he did not realize she meant to include the husband. Her testimony in the court and her conduct since that time plainly indicated that she did not want her husband informed. In this way the husband located his wife and children. A few days later she returned to Miami with the one child she brought with her. The husband boarded the same plane, but when they reached Miami, she refused to tell him where she was staying and instructed him not to follow her. The wife did not communicate with him. Through his own efforts

of search, he located them several weeks later. On November 6, 1979, at an ex parte hearing, the wife secured a restraining order against the husband. She then filed an amended petition seeking separate maintenance. The husband was served and appeared. The restraining order was lifted, and he was allowed visitation rights. There was repeated difficulty between the husband and wife concerning visitation. During a twenty-week period he was able to see the children about four times.

A hearing was held in this court by another judge pendente lite to the custody of the minor children. The wife appeared together with the husband. This court on January 12, 1980, ordered "the Defendant live and reside in suitable quarters provided by the

Plaintiff father in the (former) Canal Zone vicinity, the plaintiff being required to pay the rent and utility costs on said suitable quarters." The order also provided for certain visitation rights of the father and that, until the resolution of this matter, the father furnish an automobile for her use t oge ther wi th $350.00 every two weeks for the support of the wife and the two minor children.

The court finds that from the time of the separation to this date, the wife has persistently and unreasonably interfered with the visitation rights of the husband. She has sought excuses and has sought to evade the expressed provision of this court's order, both as to where she lived while she was here and the overnight visits of the children with the father and has

generally been uncooperative. At one time she unilaterally sought to inform the husband that unless he signed a medical benefit card, she would deny him the visitation privileges. She had no right to use the children's custody in such a manner. She could have sought relief from the court.

The husband and wife are both understandably overwrought and emotionally upset over the disintegration of this marriage. However, the court finds the wife's conduct has been extremely unreasonable and unfair. She seems to feel that because she is a mother, her rights are superior to those of the father. The court finds that prior to a short time before the separation in 1979, all of the evidence, including

that of the husband, shows that the wife was a woman of high moral character and ladylike in her conduct. The court finds that shortly before the separation, she began to manifest emotional outbursts and characteristics entirely different from her previous course of conduct. Emotionally she is undoubtedly a different person at this time than what she was a few years ago. The court finds that for a period of two or three years prior to their separation, she withdrew her affection and love from her husband, causing a break in their intermarital relations, and centered her love and affection on her children to the total deprivation of marital affection to her husband. The court finds that this conduct, together with her abandonment of him and the hiding of the children,

constitutes extreme cruelty which entitles him to a divorce.

At the time she left their home in Maryland and secreted herself and children, or shortly thereafter, she withdrew all of their checking funds from three Miami banks totaling $2,188.26. She withdrew from a safety deposit vault 170 pieces of Tiffany silver purchased in 1973 at a cost of approximately $3,853.00, and she took many valuable pieces of furniture which she and the husband had painstakingly collected during their marriage. Both parties claim this furniture to be "collector's items." She subsequently stored them without advising the husband of there whereabouts. There was a bank account in Maryland untouched. There are approximately 88 to 100 pieces of silver in the Canal Zone home. Some

of the "collector's item" furniture was left in both Maryland and the Canal Zone.

If the wife is awarded the children, she plans to live in Miami, Florida, her home before marriage. If the husband is awarded the children, he plans to continue to live in the Canal Zone, his place of employment. The wife does not expect to work unless necessary. She was employed before marriage in 1960 but has not worked outside the home since that time. The husband is a senior ship's pilot with the Panama Canal Commission. At the time they were married, he was a mate aboard an ocean-going vessel. In 1962, they moved t o the Canal Zone where he became employed as a ship's pilot. He has cont inued that profession in the Canal Zone since that

time. The nature of the work requires him to be away from home from twelve to fifteen hours on each transit through the Canal. His duty hours may be in either the daytime or nighttime and follow no regular pattern. The former Canal Zone is undergoing a transition. There is a declining number of American residents in the former Canal Zone because the United States Civil Service personnel are leaving pending the future implementation of the U.S./Panama treaties. The facilities manned by American doctors are growing smaller as well as the schools manned by American teachers.

Anders, who is now approximately six years of age, appears normal in all respects. The older boy, Erik, approximately ten years of age, has

some emotional problems. The court finds no useful purpose in setting these problems out at length in this decree. It is hoped, as he grows into maturity, these problems will be overcome, and the court does not desire to make his present problems a part of this record in its findings. The transcript will amply demonstrate this conclusion. The court finds that the father is a suitable person for the custody of the children. The court finds that the wife has been a good mother and continues to be a good mother except the court is seriously concerned over the impregnation of a dislike for the father in the minds of the children by her.

The wife and the ten-year old child Erik have made lurid and unbelievable charges concerning the

conduct of the father. The court finds that the wife has not established by a preponderance of the evidence these charges of gross misconduct before and in the presence and against the children nor her charges of illicit relationships with other females.

The court further finds that the husband's discipline of the children, Erik in particular, has not been unreasonable and has been grossly exaggerated by the wife.

Part Two

At the time the parties were married, the husband brought into the marriage one-half interest in the Maryland home, which was partially furnished, one lot, and $2,500 in cash.

The wife brought into the marriage no cash savings, a grand piano later

sold for $900, a washing machine, two wicker chairs and a wicker table, two Easter baskets (sentimental value), and her father's drafting table. Except for the piano, these items are stored in the family garage in Maryland. At the time the parties separated, they had accumulated furniture which included many collector's items valued at from sixty to one hundred thousand dollars, approximately 258 - 270 pieces of Tiffany silver purchased in 1973 for approximately $5,600, which includes twelve place settings of flatware and serving pieces. The court takes judicial knowledge that there has been a large increase in the value of silver since that time.

All the savings and bank accounts were as follows: $2,188 in Miami banks, $579 in Panama savings, and in Maryland.

The husband has an outstanding loan against an insurance policy, New York Life, of $3,888.68 and two car payments as of June 18, 1980, $888.48. He owns a 1979 GMC truck, a 1975 GMC truck, a 1971 Cadillac, and a 1960 Cadillac. The two Cadillacs are of little monetary value.

The husband has a retirement fund with the value as of January 1980, of $34,003.22. He pays approximately seven percent of his gross salary into this each pay period, which is currently running about $134.00 every two weeks. This will not be a lump sum payable upon retirement. If he were to retire at this time, he would draw fourteen to fifteen hundred dollars a month. He is fifty-five years of age. He has a hernia, a painful spur on his heel, and a steel splinter in his hand. In

all probability, the hernia and the splinter can be collected by surgery. The spur in his heel is another problem. His work requires that he stand long periods of time. It is quite painful. He has no assurance that surgery would remedy this condition. He has three insurance policies as follows: United Benefit Life Insurance, $30,000, payable to the wife; New York Life Insurance, $10,000, payable to the two children; New York Life Insurance, $15,000, payable to the children, which has a $3,886.68 loan outstanding payable to this life insurance policy.

The court has advised the parties that the furniture and silver is to be divided on the following plan: by lot the wife's name was drawn. She is to make an equal division of the furniture together with identifying numbers which

are on the furniture and present that to the husband within thirty days from June 18. The husband may choose the furniture on either list. This must be done not later than sixty days from June 18, or thirty days after the receipt of the list from the wife, whichever date is earlier.

The husband is to make an equal division of the Tiffany silver and deliver the list of the division to the wife within thirty days from June 18, 1980. The wife may choose the silver from either list and advise her husband within thirty days after t he receipt of the list.

There is in the Maryland home some furniture which the husband had at the time of the marriage and various items of linen, cooking utensils, etc., accumulated during the marriage. This

is in addition to the "collector's item" furniture.

There are also pieces of furniture, linens, glassware, cooking utensils, etc., acquired during the marriage in addition to the "collector's item" furniture. The husband should inventory the household goods in the Maryland and CoCo Solo homes, making two lists dividing these household goods. The wife may choose either list. The husband will ship the items to whatever address she gives him in Miami, Florida, freight prepaid. He should submit the lists within 90 days of the date of this decree. She should make a selection within thirty days thereafter. The husband has six months in which to arrange the shipment since the household goods are located in Panama and Maryland.

The husband should also ship to the wife those items of personal property stored in the garage in the Maryland home which she brought to the marriage.

The husband is to retain possession of the trucks and automobiles. Within three months from the date of this decree, the husband is to pay to the wife $4,000 for her use in purchasing an automobile.

The wife incurred the expense of $1,446.50 for the transportation of furniture from Maryland to Miami, including one month's storage charge. The court finds that the wife has unnecessarily incurred expenses in transporting this furniture and storing it. The furniture could have been left in the Maryland home where there would be no storage charges and no

transportation charges for his share of the property. The husband is to pay the wife one-half of these charges, or $723.25, within three months from the date of this decree.

As a further and complete settlement of community property claims against the husband, the husband is to pay the wife on or before one year from the date of this decree $10,000 upon her delivering to him her interest in the Maryland home.

The wife is awarded custody of the two minor children subject to visitation rights for the father as to be hereinafter set out. The court again specifically notes that the wife has been unreasonable in permitting the husband to exercise his visitation privileges. The wife is warned and cautioned about her conduct in the future concerning visita-

tion rights and against her wrongfully and unfairly by act and speech, impregnating the children's minds against their father.

The award of the custody is made to the wife and mother because of the totality of the circumstances. The court considers this to be in the best interest of the children at this time. The court again states that it believes the husband and father to be a good and competent custodian, but his long hours of work and the irregularity of his schedule would make it difficult for him to provide the continuous care children of this age need. Except for the wife's relationship with the husband, her care of the children has been good.

CONCLUSIONS OF LAW

The plaintiff is over 21 years of age and is a citizen of the United States

of America. He has been a continuous resident of the Canal Zone since June 1, 1978, to the present, to wit, Coco Solo (former Canal Zone), Republic of Panama. 8 C.Z.C. § 192 - residency requirements.

The wife's conduct to the husband constitute extreme cruelty, a cause for divorce. 8 C.Z.C. § 111(6).

8 C.Z.C. § 336 - Custody of minors: "The father and mother of the legitimate unmarried minor child are equally entitled to his custody. . . "

It is therefore ORDERED, ADJUDGED, and DECREED the wife is awarded custody of the two minor children subject to visitation rights for the father as to be hereinafter set out. The court again specifically notes that the wife has been unreasonable in permitting the husband to exercise his visitation privileges. The wife is warned and

cautioned about her conduct in the future concerning visitation rights and against her wrongfully and unfairly by act and speech, impregnating the children's minds against their father.

The award of the custody is made to the wife and mother because of the totality of the circumstances. The court considers this to be in the best interest of the children at this time. The court again states that it believes the husband and father to be a good and competent custodian, but his long hours of work and the irregularity of his schedule would make it difficult for him to provide the continuous care children of this age need. Except for the wife's relationship with the husband, her care of the children has been good.

It is FURTHER ORDERED, ADJUDGED,

and DECREED that the husband, August J.C. Egle, pay to the wife, Ann E. Schraedel Egle, as alimony and support of the minor children, $500.00 each two-week pay day commencing the next pay dat after this order is received by the Clerk of the Court in the Canal Zone.

The court will make supplemental Findings of Fact and Conclusions of Law with reference to the remaining property rights and visitation rights of the father.

Done, this the 18th day of July, 1980.

UNITED STATES DISTRICT JUDGE

VIRGIL PITTMAN

AUGUST J. C. EGLE, PLAINTIFF-APPELLEE,

V.

ANN E. SCHRAEDEL EGLE,

DEFENDANT-APPELLANT.

NO. 82-3037.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

SEPT. 30, 1983.

Appeal was taken from an order of the United States District Court of the District of the Canal Zone, Frank H. McFadden, J., 673 F.2d 1326, modifying divorce decree. The Court of Appeals, Will, District Judge, sitting by designation, held that: (1) Fifth Circuit Court of Appeals had appellate jurisdiction; (2) conduct of former wife in acting in disregard of her former husband's rights as parent by attempting to alienate his children from him and to

frustrate his exercise of visitation rights came within exception to general rule such that change of custody was appropriate even if no change of circumstances had occurred; and (3) district judge's reinstatement of prior order that former husband pay former wife $10,000 for her interest in Maryland home would be reversed, and parties would be left to pursue whatever remedies were available to them in Maryland.

Affirmed in part and vacated in part.

I

Statutes

Claims that legislation has been impliedly repealed are viewed with disfavor; if at all possible, seemingly inconsistent provisions are interpreted so as to give effect to both.

II

Treaties

Under United States Constitution, treaties and statutes are equal in dignity; if treaty and statute are inconsistent, one last in date will control other.

III

Federal Courts

Treaties

Even if Panama Canal treaty, at time of its ratification, or Panama Canal Act of 1979, at time of its enactment, impliedly repealed statutes providing Fifth Circuit Court of Appeals appellate jurisdiction from final decisions of Canal Zone District Court, subsequent amendments to those statutes left intact appellate jurisdiction; therefore, Court of Appeals had appellate jurisdiction over order modifying

divorce decree entered by former United States District Court for the district of the Canal Zone. 28 U.S.C.A. §§ 41, 1291; Panama Canal Act of 1979 § 25 et seq., 22 U.S.C.A. § 3601 et seq.

IV

Infants

Custody decrees, even when denominated as final, are by nature subject of modification as circumstances change.

V

Infants

Whether modification is warranted depends upon facts and circumstances of each case, and trial court's broad discretion to modify custody decree will not be disturbed absent abuse of that discretion.

VI

Divorce

There must be sufficient evidence

to support district court's factual findings which form basis for modification of custody or visitation provisions of divorce decree; in reviewing sufficiency of evidence to support those findings, however, Court of Appeals must view evidence in light most favorable to appellee.

VII

Divorce

Canal Zone Code section providing that court may make such alterations in allowance of alimony and maintenance and care, custody and support of children "as appear reasonable and proper," does not thereby provide for a lesser standard than "change of circumstances" standard. 8 C.Z.C. § 235.

VIII

Divorce

There was sufficient evidence to

support findings that former wife had attempted to interfere with former husband's maintenance of parental relationship with his children, that district court judge's order put her on notice that further interference with former husband's exercise of his visitation rights might jeopardize her custody of children, and that former wife had not heeded that warning.

IX

Divorce

It was not improper for district judge, in determining whether change of custody from former wife to former husband was appropriate, to hear evidence on and consider events which occurred before date of entry of final decree, where former husband alleged not only particular incidents occurring after that date but also a continuation of a

pattern of conduct; events prior to entry of final decree were background information which placed later incidents in context and were relevant to question of whether wife had continued to act in manner contrary to district judge's warning that further interference with former husband's exercise of his visitation rights might jeopardize her custody of the children.

X

Infants

Requirement that change of circumstances be shown before custody will be changed is not an ironclad rule.

XI

Infants

A showing of sabotage or deliberate frustration of visitation rights provides an alternate ground for change of custody and obviates need to show change

of circumstances.

XII

Parent and Child

As general rule, custodial parent is entitled to change residences unless move is detrimental to child.

XIII

Parent and Child

That change of habitation practically deprives one parent of visitation rights is generally insufficient to justify restraint upon custodial parent's freedom of movement; however, general rule does not govern when custodial parent's intent in changing residence is to frustrate or destroy other parent's visitation rights.

XIV

Parent and Child

Where motive to conceal children from noncustodial parent or otherwise

frustrate that parent's right to visit and maintain contact with children can reasonably be inferred from circumstances surrounding move by custodial parent, changes in custody may be appropriate as means of assuring that rights of both parents, and those of minor children, will be honored.

XV

Divorce

Conduct of former wife in attempting to interfere with her former husband's maintenance of parental relationship with his children warranted change of custody to former husband, even without showing of material change of circumstances; in light of district judge's warning that further interference with former husband's exercise of his visitation rights might jeopardize her custody of the children, her subsequent conduct

could be viewed as change from circumstances and conduct which was anticipated at time primary custody was awarded in her favor.

XVI

Divorce

District judge did not err in concluding that change of custody was in best interests of children in view of former wife's conduct in attempting to interfere with her former husband's maintenance of parental relationship with his children.

XVII

Divorce

There was no evidence that district judge, who stated that change of custody from former wife to former husband was warranted in view of former wife's attempted interference with her former husband's maintenance of parental relationship with his children, regarded that

valid reason as a pretext for an unknowledged motive, such as a desire to punish former wife for her failure to dismiss her collateral Florida lawsuit for several weeks following receipt of his order to do so.

XVIII

Divorce

While under sections of Canal Zone Code, district court in divorce action was permitted to allocate parties' interests in real property located outside Canal Zone in arriving at fair and reasonable distribution of parties' various property interests, there was no evidence in record as to either extent of former wife's interest in Maryland home or fair market value of that property; therefore, order that former husband pay former wife $10,000 within one year of date of decree in return for her interest

in home would be reversed, and parties would be left to pursue whatever remedies were available to them in Maryland for resolution of their respective interests in the property. 8 C.Z.C. §§ 278, 280.

Appeal from the United States District Court for the District of the Canal Zone.

Before WILLIAMS and JOLLY, Circuit Judges, and WILL*, District Judge.

WILL, District Judge:

This is an appeal from an order which modified a divorce decree respecting the custody of the parties' minor children, the amount of alimony and child support, and distribution of certain property.

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*District Judge of the Northern District of Illinois, sitting by designation.

Both the divorce decree and the order modifying it were entered by the former United States District Court for the District of the Canal Zone, a court which ceased to exist as of April 1, 1982, pursuant to Article XI of the Panama Canal Treaty.

An earlier panel of this circuit considered the merits of the appeal from the modification order, but did so without the benefit of oral argument and in an expedited fashion in light of the possibility that appellate jurisdiction might, like the district court itself, expire on April 1, 1982.[1] In an unpublished

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[1] Appellee's brief was filed on March 29, 1982, and the appeal was then transmitted to the previous panel "at the eleventh hour of the Canal Zone District Court's existence." Egle v. Egle,

opinion, that panel affirmed the modification order on its merits, with one judge dissenting. See Egle v. Egle, 673 F.2d 1326 (5th Cir. 1982) (noting only affirmance). A timely petition for rehearing was filed and granted, 679 F.2d 380 (5th Cir. 1982), and further briefing was requested regarding this court's post-March 31, 1982 appellate jurisdiction of decisions of the former district court. Upon rehearing, the panel which had affirmed the modification vacated that affirmance, and transferred the case to the circuit's oral argument calendar. Egle v. Egle, 690 F.2d 446 (5th Cir. 1982) (per curiam). Having had the benefit of briefing and oral argument on both the merits and the jurisdictional questions,

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673 F.2d 1326 (5th Cir. 1982).

we now conclude that we have jurisdiction to review the modification order, and we affirm that order in part and vacate it in part.

I. Factual Background and Proceedings in the District Court

Ordinarily, review of a modification of a divorce decree focuses upon events occurring after entry of that decree. See generally Part III, infra, of this opinion. However, the parties' arguments as to the propriety of the modification ordered by the district court require familiarity with fairly extensive background information.

August Egle and Ann Egle were married on September 3, 1960, in Miami, Florida. They have two children, Erik and Anders, born on December 2, 1969, and November 3, 1974, respectively. Although they maintained a home and other

property in Glen Burnie, Maryland (Mr. Egle's hometown), their marital domicile at the time of their separation on August 5, 1979, was the former Canal Zone, where Mr. Egle worked as a ship pilot on transits through the canal.

The record reflects that the parties and their children were at various times in 1979, in the former Canal Zone, Maryland, or Miami, the general pattern being one of Mr. Egle's attempting with some difficulty to locate and catch up with his wife and children. For example, on one occasion he telephoned his children in Maryland from the Canal Zone, and stated that he would be in Maryland the next day. Upon arrival at their Maryland home, he found only a letter, from his wife's attorney, informing him that Mrs. Egle was considering a divorce, but no information as to the whereabouts of

Mrs. Egle or the children. He returned to the Canal Zone, where he learned through the vicar of his church that Mrs. Egle planned to return to the Canal Zone on August 13. On that date he filed an action for divorce in the former United States District Court for the District of the Canal Zone,[2] and served her with process.

Following the commencement of divorce proceedings in the Canal Zone, Mrs. Egle returned to Miami with one of the children. The chase of the previous months resumed, as her husband boarded the same flight to Miami, but she refused to tell him her precise destination, and upon arrival told him not to follow her. Through his own efforts he located her several weeks later. On November 6, 1979, Mrs. Egle obtained

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[2]The United States District Court

an ex parte restraining order against her husband from a Florida court. She later served him with an amended petition seeking separate maintenance. When he appeared, the restraining order was lifted, and he was allowed visitation rights. However, as Judge Pittman later found, Mr. Egle met with considerable resistance in attempting to exercise those rights.

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for the District of the Canal Zone was a court of general jurisdiction. See Canal Zone Code tit. 3, §§ 1 and 141, printed in 76A Stat. at 51 and 56. The district court was specifically given jurisdiction over actions for divorce. C.Z. Code tit. 8, § 191, 76A Stat. at 681.

Meanwhile the Canal Zone divorce action proceeded. During the last several years of the district court's existence, that court was staffed by visiting judges (generally district judges from within the old Fifth Circuit) designated by the Chief Judge of the Circuit.)[3] The privilege or onus of presiding over the Egle case was shared by several judges, but was born predominantly by Judges Virgil Pittman and Frank McFadden.

On January 11, 1980, Judge McFadden held a hearing on Mr. Egle's motion for custody of both children pendente lite, and entered an order dated January 12, 1980, awarding such custody to Mrs. Egle.

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[3] See Pub.L. 96-70, § 1515; 1979 U.S. Code Cong. & Adm. News 1034, at 1082. From July 1, 1979 through March 31, 1982, Judge Morey Sear of the Eastern District

That order was conditioned upon her moving back to the Canal Zone and residing in suitable quarters, to be provided by her husband, and upon the granting of "reasonable visitation rights" to Mr. Egle. Although Judge McFadden urged the parties to agree on the specifics of visitation, he set the parameters of visitation rights as at least once per week with Mr. Egle's having the right to temporary custody for a 24-hour period at least once every two weeks in addition to weekly visitation.

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of Louisiana acted as Chief Judge of the District of the Canal Zone, for purposes of administration during the transitional period. However, the judicial functions of the former district continued to be performed by various judges on a rotating basis.

Judge McFadden's comments at the pendente lite custody hearing state a theme which recurs frequently in this record and which indicates the frustration which results when the standard (governing custody decisions) of what is in the children's best interest might easily be restated as which choice presents the lesser of two evils:

> If it was within the Court's power, the Court would remove the child from the custody of both parents until this matter is resolved. The child--or rather the children, particularly the older one, are caught in the crossfire between competing and apparently vengeful parents.

* * * * * *

> [I]t is in all probability that I shall never see either of you again. I am impressed by the fact that you are using your child as a pawn, as an instrument in your own personal fight; and I suggest to you that is a grievous injury to impose upon the child you brought into the world.

Judge McFadden also ordered that if Mrs. Egle elected to remain in Miami rather than move back to the Canal Zone pendente lite her husband would have temporary custody of the elder child, and she would have temporary custody of the younger child, the decision regarding future custody of both children to be made following a further hearing and entry of an interlocutory divorce decree.

Mrs. Egle returned to the Canal Zone

per Judge McFadden's order. A further hearing on the various issues pertinent to the Egles' divorce action was held on June 16-18, 1980, before Judge Pittman.

In his opinion and order of July 18, 1980, Judge Pittman noted that if Mrs. Egle was awarded custody she planned to move back to Miami, and that her husband, if awarded custody, planned to continue to live and work in the Canal Zone. Judge Pittman observed that Mr. Egle's work as a ship's pilot "requires him to be away from home from twelve to fifteen hours on each transit through the Canal. His duty hours may be in either the daytime or nighttime and follow no regular pattern."

In his findings of fact, Judge Pittman also determined that Mrs. Egle had been extremely upset emotionally for "a period of two or three years" prior

to the Egles' separation, had become estranged from her husband while focusing her love and affection upon their children, and that her estrangement from her husband "together with her abandonment of him and the hiding of the children, constitutes extreme cruelty which entitles him to a divorce."

Judge Pittman characterized Mrs. Egle's post-separation conduct with respect to her husband's right to maintain a parental relationship with his children as "unreasonable and unfair," stating that "[s]he seems to feel that because she is a mother, her rights are superior to those of the father." Judge Pittman also found that

> from the time of the separation to this date, the wife has persistently and unreasonably interfered with the visitation

> rights of the husband. She has sought excuses and has sought to evade the expressed provision of this court's order, both as to where she lived while she was here and the overnight visits of the children with the father and has generally been uncooperative. At one time she unilaterally sought to inform the husband that unless he signed a medical benefit card, she would deny him the visitation privileges. She had no right to use the children's custody in such a manner. She could have sought relief from the court.

In addition, Judge Pittman found that Mrs. Egle had tried to "impregnat[e] the

children's minds aganist their father," and that she and the elder child, Erik (then ten years old), had made "lurid and unbelievable charges concerning the conduct of the father" which had not been established by a preponderance of the evidence.

Notwithstanding Mrs. Egle's conduct, Judge Pittman awarded the custody of the two children to her, based upon the "totality of the circumstances":

> The court finds that the father is a suitable person for the custody of the children. The court finds that the wife has been a good mother and continues to be a good mother except the court is seriously concerned over the impregnation of a dislike for the father in the minds of the

children by her.

* * * * * *

The wife is awarded custody of the two minor children subject to visitation rights for the father as to be hereinafter set out. The court again specifically notes that the wife has been unreasonable in [not] permitting the husband to exercise his visitation privileges. The wife is warned and cautioned about her conduct in the future concerning visitation rights and against her wrongfully and unfairly by act and speech, impregnating the children's minds against their father.

The award of the custody is made to the wife and mother because of the totality of the

> circumstances. The court considers this to be in the best interest of the children at this time. The court again states that it believes the husband and father to be a good and competent custodian, but his long hours of work and the irregularity of his schedule would make it difficult for him to provide the continuous care children of this age need. Except for the wife's relationship with the husband, her care of the children has been good.

Judge Pittman also ordered Mr. Egle to pay Mrs. Egle $500.00 every two weeks "as alimony and support of the minor children." The July 18 order also divided certain assets and liabilities between Mr. and Mrs. Egle, and set up a procedure

by which other property (household goods such as furniture and silverware, located variously in Maryland, Miami, or the Canal Zone) would be inventoried and divided between them. The only property distribution that is significant for this appeal is Judge Pittman's decision that Mr. Egle pay Mrs. Egle $10,000.00 within one year of the date of the decree in return for her interest in their Maryland home. Judge Pittman found that "[a]t the time the parties were married, the husband brought into the marriage one-half interest in the Maryland home...." Judge Pittman did not, however, make a finding as to the 1980 value of the Maryland home.

On August 15, 1980, Judge Pittman entered his "Supplemental Findings of Fact and Conclusions of Law." For purposes of this appeal that supplemental order contains two significant decisions.

First, Judge Pittman revoked his earlier decision that Mrs. Egle convey her interest in the couple's Maryland home to Mr. Egle in return for $10,000.00, concluding that provisions in the Canal Zone Code for distribution of community property upon divorce applied only to personal property and not to real property located outside of the Canal Zone.[4] Judge Pittman therefor concluded that unless the parties agreed to the court's prior distribution of interests in the Egles' Maryland home within 45 days of the filing of the supplemental findings, the laws of the State of Maryland would govern their respective interests in property located in that state.

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[4]The provisions in question were sections 278 and 280 of Title 8 of the Canal Zone Code. Section 278 reads as

follows:

§ 278. Separate property generally

The following property, with the rents, issues and profits thereof, is the separate property of a spouse;

(1) property owned by the spouse before marriage; and

(2) property acquired by the spouse after marriage by gift, bequest, devise or descent. The wife may convey her separate property without the consent of her husband.

76A Stat. at 686. Section 280 states as follows:

§ 280. Community property; presumptions

(a) Except as provided by sections 278 and 279 of this title, personal property,

wherever situated, acquired after marriage by either husband or wife, or both, while residing in the Canal Zone, is community property; but whenever personal property, or an interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that it is her separate property, and if acquired by her and another person, the presumption is that she takes the part acquired by her, as an interest in common, unless a different intention is expressed in the instrument; except that when personal property is acquired by husband and wife, unless a different intention is ex-

pressed in the instrument, the presumption is that the property is the community property of the husband and wife.

(b) The presumptions provided for by sub-section (a) of this section are conclusive in favor of a person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest and regardless of a change in her marital status after acquisition of the property.

76A Stat. at 686.

Second, Judge Pittman's supplemental order of August 15, 1980, specified Mr. Egle's visitation rights. Pursuant to the supplemental order, Mr. Egle was entitled to custody of both children for a two month period each summer, and to custody for any weekend upon written notice at lease one week in advance of any designated weekend. The supplemental order also provided for custody during the Thanksgiving and Christmas holidays, one parent to have custody for one holiday and the other parent to have custody for the other holiday, the parents to exchange custodial holidays from year to year.

Finally, on October 8, 1980, Judge Pittman amended his order of July 18, 1980, nunc pro tunc, to reflect that the July 18 order was an interlocutory decree of divorce, rather than a final decree. Judge Pittman's order to October 8, pro-

vided in accordance with sections 198(a) and (b) of Title 8 of the Canal Zone Code[5] that

> when six (6) months from the date of entry hereof shall have elapsed and the parties hereto are both alive and unreconciled the one with the other and there is no appeal or motion to set aside pending and undetermined, the plaintiff, AUGUST J. C. EGLE, upon application and Final Decree of

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[5]Section 198 of Title 8 of the Canal Zone Code states as follows:

> § 198. Interlocutory order; appeal; final decree of divorce
>
> (a) A final decree granting a divorce may not be entered until after the expiration of a

period of six months from the date of the entry of an interlocutory order adjudging that a case for divorce has been proved. The interlocutory order shall expressly state that a divorce is not granted by it. An appeal may be taken from the order in the same manner and within the same time as an appeal from a final decree of the court in any other proceeding.

(b) After the expiration of the period of six months provided by subsection (a) of this section, or if an appeal is taken and the case is pending at the time of the expiration of the period, after the final disposition

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of the case if determined in favor of the plaintiff, the court, upon application filed within 30 days after the expiration of the period or the final disposition, by the person in whose favor the interlocutory order was entered, shall enter a final decree granting a divorce. If an application is not made, the court may, on its own motion, within three months after the expiration of the 30-day period, enter a final decree of divorce. An appeal may not be taken from the final decree.

76A Stat. at 683.

Divorce submitted, shall be entitled to a Final Decree of Divorce cancelling and dissolving the bonds of matrimony binding the plaintiff to the defendant and, thus, restoring them, AND EACH OF THEM, to the status of single, unmarried persons.

THIS IS AN INTERLOCUTORY DECREE AND NO DIVORCE IS GRANTED HEREBY.

[Emphasis in original.]

On September 23, 1980, Mr. Egle had moved for modification of Judge Pittman's order (of July 18, 1980, as supplemented by the August 15 order) respecting the specifics of his visitation rights and other matters not pertinent here. Judge Pittman summarily denied that motion on October 8, 1980.

On October 30, 1980, Mr. Egle filed a second motion for modification of visitation rights, essentially a motion for

reconsideration of the denial of the earlier motion. He alleged that a change of circumstances (since the hearing in June of 1980) had occurred, and requested a hearing on whether visitation rights should be expanded in light of the change in his work schedule to a "Pilot's 6-4 Work Plan," i.e., periods of six weeks of work alternating with periods of four weeks paid vacation, thereby allowing him to spend approximately four weeks in Miami (where Mrs. Egle had moved with their children) out of every ten weeks. Following briefing of the motions to modify the decree, Judge Pittman, on May 12, 1981, vacated his denial of the motion filed on September 23, 1980, and scheduled a hearing for June 15, 1981.

Meanwhile, Mrs. Egle had begun collateral proceedings in the Circuit Court of Dade County (Florida) "for [e]nforce-

ment and [m]odification of [j]udgment and ... for [d]eclaration of [r]ights." She sought, among other things, an increase in the amount of alimony and child support, alleging that her expenses had increased and that mr. Egle's income had doubled since the date of the interlocutory decree. In support of her position that any hearing be held in the Florida courts in Miami, she argued that no final divorce decree had been timely sought or entered in the Canal Zone and that the Canal Zone district court had lost its jurisdiction to enter such an order nunc pro tunc.

Mr. Egle, had however, filed on April 9, 1981, an application for a final decree of divorce. Contrary to Mrs. Egle's later jurisdictional objection, the application for entry of a final decree was not yet ripe for filing because the pending motion for reconsideration of

the denial of the motion to modify the interlocutory decree was essentially a motion to set aside portions of that decree. Section 198 and Judge Pittman's order of October 18, 1980, made such an application inappropriate until thirty days after resolution of the motion to modify.[6] On June 19, 1981, Judge McFadden entered a final decree of divorce, nunc pro tunc to May 8, 1981.

Shortly thereafter, on June 22, 1981, Judge McFadden held in abeyance the

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[6]Alternatively, the application was timely. Section 198 and Judge Pittman's order of October 8, 1980, provided only that a final decree could be obtained after six months had elapsed from July 18, 1980, not that the application had to be filed within a particular period of time.

pending motions (and the rescheduled hearing) pending appointment of a guardian ad litem for the minor children. On July 10, 1981, he appointed Ms. Brenda Abrams, an attorney from the Miami area specializing in family law, as the guardian, finding that "the parents in this case ... are using the minor children as foils and ... care for the children is at best a secondary motive." Judge McFadden, on July 16, 1981, ordered Mrs. Egle to dismiss the action that she had filed in the Circuit Court in and for Dade County. She did not do so until September 14, 1981, following her former husband's filing of a petition for sanctions, although the Dade County court had abated her action on August 4, 1980, upon a motion filed by Mr. Egle.

On September 15, 1981, Mr. Egle amended his motion to modify the decree of July 18, 1980, to request (rather than

an expansion of visitation rights) that primary custody of the children be taken from his former wife and given to him, alleging that the "totality of the circumstances" had changed such that primary custody with Mr. Egle had become in the children's best interests. The bases for the requested change of custody were, according to Mr. Egle, his former wife's consistent interference with and frustration of the exercise of his visitation rights, as manifested in particular by the circumstances surrounding her change of residence from Miami to Palm Coast, Florida, continued attempts to turn the children against him, and her violation of the court's warning and order.

The parties stipulated to holding the hearing on all motions[7] to modify the

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[7]Other motions to modify the inter-

provisions of Judge Pittman's decree in Miami on September 24 and 25, 1981, with Judge McFadeen sitting as the district court for the district of the Canal Zone.

In Miami, Mrs. Egle and the children lived with Mrs. Egle's mother, in the grandmother's apartment building.[8] On

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locutory decree dealt with disputes over procedures established for division of the Egles' personal property, and are not pertinent here.

[8]The record is not entirely clear as to whether the grandmother owned the building or was a tenant in the building. It appears from the record that Mrs. Egle and the children did not occupy part of the grandmother's unit but instead occupied a unit across the hall from the grandmother's unit.

August 25, 1981, she and the children moved to a house in Palm Coast, Florida, located approximately 285 miles north of Miami and 25 miles north of Daytona Beach. No advance notice of the move was given either to Mr. Egle or to the guardian. By a letter dated September 5, 1981, and postmarked September 8, 1981, Mrs. Egle informed her former husband of the move. In this letter she did not give her new address, but listed a post office box and her telephone number. She also indicated in the letter that she would be willing to take the children to the Daytona airport to meet their father.

At the hearing, Mr. Egle testified that after learning of the move, he attempted to discover what schools the children were attending. Upon identifying the only school which his elder son could be attending, he called the principal. According to

Mr. Egle, the principal refused to give him any information about his son, telling him that his refusal was based on the child's mother's orders. However, at no time between receipt of his former wife's letter and the date of the hearing did Mr. Egle call the telephone number provided in the letter.

Mr. Egle also testified to encountering difficulty in exercising his visitation rights when Mrs. Egle and the children resided in Miami. Specifically, Mr. Egle testified that on a visit during June or July of 1981, Mrs. Egle's brother told him not to come onto their property anymore. According to Mr. Egle, his former brother-in-law grabbed a steel chair while both men were in the foyer of the building, raised the chair over his own head, and threatened, "I'm going to kill you, you sonofabitch." The former brother-in-law

thereupon followed Mr. Egle out into the street.[9]

Mr. Egle also testified to his impression that his former wife was trying to alienate their sons from him. He did not give any examples of statements about him made by Mrs. Egle in the presence of their children, stating only that such criticism was "indirect" and "subtle," and in the nature of innuendo. He testified further that his sons, particularly the elder one, were aloof and outwardly hositle to him when in the presence of both parents. According to Mr. Egle, he never received telephone calls or letters

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[9]It appears from the transcript that all of these manifestations of belligerence occurred on one occasion, though there is no indication as to whether the children witnessed any of these scenes.

in Panama from his sons when they were in Miami, though he enclosed stamps and envelopes in his letters to them and encouraged them to call and write to their mother when they stayed with him in Panama.

The guardian corroborated Mr. Egle's testimony concerning Mrs. Egle's conduct in connection with the move to Palm Coast, her attitude toward her former husband, and how that attitude affected her treatment of her former husband's rights to visit and maintain contact with their children. The guardian testified that she was not aware of any plans by Mrs. Egle to move from Miami until Mrs. Egle telephoned her on September 3, 1981, and said that she had moved to Palm Coast on August 25. Mrs. Egle at first gave the guardian her postal box number and telephone number, and informed the guardian of her new street address when the

guardian asked for it. Upon learning that Mr. Egle had not been told of the move, the guardian urged Mrs. Egle to send him the new address and telephone number. According to the guardian, Mrs. Egle agreed to send the Post Office box number and telephone number, but was adamant about not wanting to tell her former husband her new street address.

The guardian also testified that Mrs. Egle was hostile toward her former husband, and communicated this hostility by innuendo and "indirect criticism" to their children. According to the guardian, Mrs. Egle had told her that she had explained to her sons that Mr. Egle would always be their natural father unless he died or they were adopted by another party. In the guardian's opinion, Mrs. Egle had not in any way encouraged contact between the children and their father but

rather had created an atmosphere which minimized such contact.

The guardian corroborated Mr. Egle's testimony that the move from Miami to Palm Coast would greatly inconvenience him in the exercise of visitation rights. The guardian was also of the opinion that Mrs. Egle's earlier conduct had "restricted visitation to the absolute minimum.... [E]ach and every one of her actions is consistent with the view that she would like the children to see as little of Captain Egle as possible."

In the guardian's opinion, the elder child was very close to his mother, and had in the past been hostile toward his father, though that relationship had improved during the summer weeks that the children had spent with their father. She was also of the opinion that the younger child had good relationships with each

parent, and that the two boys had a good relationship with each other.

The guardian concluded that Mrs. Egle was "a very good mother with a major exception, of her relationship with the children in regard to their father." The guardian also concluded that Mr. Egle was "a fine person and a fine father." She was of the opinion, however, that custody of both children should remain with Mrs. Egle because the elder child clearly did not want to reside with his father and would be likely to be hostile toward him if forced to live with him. In her opinion, a good relationship between Mr. Egle and the elder son would have to be developed gradually. She advised against keeping the children apart, and concluded that frequent visits by Mr. Egle would be sufficient to counteract Mrs. Egle's influence upon the children and to enable him to

maintain rapport with his sons.

Mrs. Egle testified that she had moved to Palm Coast because she believed it to be a better place than Miami to raise children. While she could afford to rent a house (rather than an apartment) in Palm Coast, equivalent housing in Miami was beyond her means.

She testified that she had tried to accomodate her former husband in the exercise of visitation rights, by agreeing to last-minute changes in schedules and by allowing for the difficulties that he encountered from time to time with taxis and rented cars. She denied saying bad things about him to their children or otherwise attempting to influence their attitude toward him, and stated that she had encouraged the children to show affection for their father and to write to him.

In contrast to the guardian's testimony, Mrs. Egle testified that she "believed" that she had told the guardian, on July 17, 1981, that she was thinking of leaving the Miami area, but did not tell her where she would go because she had not yet decided on an area. She could not explain, however, why she did not also inform her former husband of what she was contemplating.

Mrs. Egle stated that she had fears about Mr. Egle's knowing where she lived and she had told the guardian of her fears. At first, she was not able to explain the basis for her fears,[10] then cited an

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[10] In an earlier hearing, however, Mrs. Egle accused Mr. Egle of having attempted to run her over with his automobile.

incident in July of 1981 when Mr. Egle had arrived for visitation with a police escort.[11]

During the hearing, Judge McFadden found Mrs. Egle in contempt of court for her failure to dismiss her Dade County lawsuit expeditiously. Judge McFadden did not impose any fine upon her or sentence her to any period of incarceration, and stated that his finding that Mrs. Egle had been in contempt of court would not determine his decision regarding Mr. Egle's

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[11] His request for a police escort occurred following his alleged receipt of an anonymous death threat via a telephone call at his hotel in Miami, when, to his knowledge, the only people who knew where he was staying were Mrs. Egle and her relatives.

motion for a change of custody.[12]

In an opinion dated December 15, 1981, Judge McFadden modified the decree so as to award custody of the children to their father. Judge McFadden noted Judge Pittman's concerns about Mrs. Egle's attempts to instill in her children an extreme dislike for their father, and Judge Pittman's warning to her about her future conduct concerning visitation rights.

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[12]Although Mrs. Egle did not appeal from Judge McFadden's finding that she had been in contempt of court for her dilatory dismissal of her Dade County lawsuit, she argues that he took custody of the children from her to punish her for her violation of court orders. She now states that following the abatement of her Dade County lawsuit, her Florida counsel informed her Canal Zone counsel of the abatement and

Judge McFadden added:

> She has not heeded the warning. She has moved the children without letting the father know their whereabouts. She ignored the proceedings in this court and started a separate proceeding in Florida which could only have been designed to harass and whip-saw her former husband. She ignored instructions and orders of this court to dismiss the Florida case. It was finally dismissed when she faced a contempt proceeding in this court.

* * * * * *

"requested ... Panamanian counsel to so advise the judge [i.e., Judge McFadden]

It has been clearly demonstrated that the defendant will do everything in her power to frustrate her former husband's rights with respect to his children and that her interest is not for the welfare of the children but to retaliate against him. It is my further judgment that she will continue to do so.

* * * * * *

The court is concerned about the provisions to be made for the children's care

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in the hopes that the judge would reconsider his order requiring the Wife to dismiss the State Court action." Appellant's Brief at 32.

while their father is away on his job. The court is of the opinion, however, if the matter is ever to be brought to rest and some stability brought into the life of the children it can only be if the father has their custody. The court reiterates Judge Pittman's finding that the father is a fit custodian. It is also the court's opinion that the disruption of the children is outweighed by the necessity for a change in custody. It is the opinion of the court that the father has the right to work where he wishes and to assume the responsibility for the care of his children. It will be his duty to work out the details

of their care and his job.

In conjunction with this change of custody from Mrs. Egle to Mr. Egle, Judge McFadden gave Mrs. Egle essentially the same visitation rights that had previously been held by Mr. Egle. Judge McFadden also rescinded provisions for Mr. Egle's payment of child support, except that he ordered Mr. Egle to pay $500.00 every two weeks during the summer when the children are with their mother. Judge McFadden also ordered Mr. Egle to pay alimony of $250.00 every two weeks until January 1, 1983.

Additionally, Judge McFadden reinstated Judge Pittman's earlier order that Mr. Egle give Mrs. Egle $10,000.00 in return for her conveyance to him of her interest in their home in Maryland. Finally, Judge McFadden denied Mrs. Egle's application for attorney's fees, stating that "[m]ost of the legal work was caused

by the defendant's own attempts to modify the decree and to defend against [sic] her own unwarranted conduct and should not be paid by the plaintiff."

Mrs. Egle appealed from the order changing primary custody from her to her former husband, from the reduction of Mr. Egle's obligation to pay alimony and child support, from the order mandating conveyance to her former husband of her interest in their Maryland home, and from the denial of her application for attorney's fees. The parties stated during oral argument that Mrs. Egle had remarried during the interim, and had withdrawn her appeal from Judge McFadden's limitation upon Mr. Egle's payment of alimony. Interestingly, as was also disclosed during oral argument, her new husband also works in the former Canal Zone as a ship pilot. Mrs. Egle (the name which we will continue to call her for

purposes of this opinion) still resides in Palm Coast, Florida, though evidently divides her time between Florida and Panama.

II. The Jurisdictional Questions

The statutory basis for our appellate jurisdiction of this case, 28 U.S.C. §§ 41 and 1291, continues to give this circuit jurisdiction of appeals from final decisions of the Canal Zone district court, notwithstanding amendments to those statutes effective April 2, 1982, the day following expiration of the transitional period provided by the Panama Canal Treaty and the abolition of the district court itself.[13] In its current form, 28 U.S.C. § 1291 states:

> The courts of appeals (other than the United States Court of

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[13] See Also 28 U.S.C. § 1292(a)(1), as amended April 2, 1982, Pub.L. 97-164,

Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court....

Title I, § 125, 96 Stat. 36. The Federal Courts Improvement Act of 1982, Pub.L. 97-164, 96 Stat. 25, the source of these amendments to 28 U.S.C. §§ 41, 1291, and 1292, dealt primarily with the creation of the United States Court of Appeals for the Federal Circuit. Although the post-transitional period jurisdiction of

appeals from decisions of the former United States District Court for the District of the Canal Zone was not the focus of Pub.L. 97-164, debate over the merits and mechanisms of this country's divestiture of sovereignty over the Panama Canal Zone was so recently in the public and congressional consciousness that we think it unlikely that failure to remove from sections 41, 1291, and 1292 references to the Canal Zone district court was merely an oversight.

As amended April 2, 1982, P.L. 97-164, Title I, § 124, 96 Stat. 36 [emphasis added]. In its current form, 28 U.S.C. § 41 states, in pertinent part:

> The thirteen judicial circuits of the United States are as follows:
>
> | Circuits | Composition |
> | --- | --- |
> | * | * * |
> | Fifth..... | District of the Canal Zone, Louisianna, Mississippi, Texas. |
> | * | * * |

As amended April 2, 1982, P.L. 97-164, Title I, § 101, 96 Stat. 25 [emphasis added].

[1] In light of the plain language of the current versions of these statutes, we have jurisdiction over this matter

unless some subsequent enactment has effected an implied repeal of those portions of the statutes which mention the Canal Zone district court. Claims that legislation has been "impliedly repealed" are viewed with disfavor; if at all possible, seemingly inconsistent provisions are interpreted so as to give effect to both. Watt v. Alaska, 451 U.S. 259, 267, 101 S.Ct. 1673, ----, 68 L.Ed.2d 80 (1981); Allen v. McCurrey, 449 U.S. 90, 99, 101 S.Ct. 411, ----, 66 L.Ed.2d 308 (1980).

Were it not for the amendments (effective April 1, 1981) to 28 U.S.C. §§ 41 and 1291, two separate laws might be sources of an implied repeal of our § 1291 mandate to review decisions of the Canal Zone district court. One of those laws is the Panama Canal Treaty itself. The other

is the Panama Canal Act of 1979,[14] a comprehensive act designed to implement the treaty.

By the Panama Canal Treaty, the United States relinquished sovereignty over the Canal Zone, ending a regime that had prevailed since 1903.[15] As of October 1, 1979, the date the treaty entered into force, the Republic of Panama "reassume[d] plenary jurisdiction over the former Canal Zone...." Treaty, Art. XI, § 1. However, "[i]n order to provide for an orderly transition to the

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[14] Pub.L. 96-70, 93 Stat. 493 (September 27, 1979).

[15] The Panama Canal Treaty superseded a 1903 agreement between the United States and Panama that, in its Article III, granted the United States the right to exercise in the Canal Zone all the rights,

power, and authority "which the United States would possess and exercise if it were the sovereign of the territory ... to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." Convention for the Construction of a Ship Canal, done Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431, reprinted in Canal Zone Code Appendix at 428 (1963). One of the rights of a sovereign is the right to administer justice, and, accordingly, in 1904 the United States created a complete system of courts for the Canal Zone. See 3 C.Z. Code Annotated § 1 and annotations thereto. Pursuant to the statutory predecessors of 28 U.S.C. §§ 41, 1291 and 1292, this court was vested with appellate jurisdiction to review decisions of the Canal Zone district court.

full application of the [new] jurisdictional arrangements," the treaty provided a thirty-month transitional period. Id. During this period (from October 1, 1979 through March 31, 1982), "the civilian courts of the United States of America in the Republic of Panama" had no jurisdiction over new civil cases, but retained full jurisdiction "to dispose of any civil cases, including admiralty cases, already instituted and pending ... prior to the entry into force of [the] Treaty [(October 1, 1979)]." Id. Art. XI, § 6. Mr. Egle's divorce action, filed on August 13, 1979, was thus among the last of the civil cases filed in the district court.

The drafters of the treaty were aware that all civil cases pending in the Canal Zone courts as of October 1, 1979, might not be finally adjudicated by the end of the thirty-month transitional period.

Thus, section 7 of Article XI provided that the United States and Panama

> shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pending at the end of the transition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instruments.

Unfortunately, the consultations contemplated by section 7 never took place, and therefore we have no clear guidance as to how the present appeal should be handled. At the close of the transitional period the district court was abolished.

Mr. Egle argues that the literal language of the treaty removed the appellate jurisdiction of this court to review

decisions of the former United States District Court for the District of the Canal Zone as of April 1, 1982, even where a timely appeal was filed before the date but was not decided on or before March 31, 1982. The relevant provisions[16] of the treaty do not specifically mention this court or specifically distinguish between appellate and district court jurisdiction during the transitional period. The treaty does not expressly abolish our appellate jurisdiction (as of April 1, 1982) of decisions made by the district court during the transitional period.

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[16]The pertinent provisions of that treaty are contianed in sections 1, 5, 6 and 7 of its Article XI:

Article XI

PROVISIONS FOR THE TRANSITION PERIOD

The Republic of Panama shall reassume plenary jurisdiction over the former Canal Zone upon entry into force of this Treaty and in accordance with its terms. In order for an orderly transition to the full application of the jurisdiction arrangements established by this Treaty and related agreements, the provisions of this Article shall become applicable upon the date this Treaty enters into force, and shall remain in effect for thirty calendar months. The authority granted in this Article to the United States of America for this transition period shall supplement, and is not intended to limit,

the full application and effect of the rights and authority granted to the United States of America elsewhere in this Treaty and in related agreements.

* * * * * *

5. The courts of the United States of America and related personnel, functioning in the former Canal Zone immediately prior to the entry into force of this Treaty, may continue to function during the transition period for the judicial enforcement of the jurisdiction to be exercised by the United States of America in accordance with this Article.

6. In civil cases, the

civilian courts of the United States of America in the Republic of Panama shall have no jurisdiction over new cases of a private civil nature, but shall retain full jurisdiction during the transition period to dispose of any civil cases, including admiralty cases, already instituted and pending before the courts prior to the entry into force of this Treaty.

7. The laws, regulations, and administrative authority of the United States of America applicable in the former Canal Zone immediately prior to the entry into force of this Treaty shall, to the extent not inconsistent with this Treaty and related agree-

ments, continue in force for the purpose of the exercise by the United States of America of law enforcement and judicial jurisdiction only during the transition period. The United States of America may amend, repeal or otherwise change such laws, regulations and administrative authority. The two Parties shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pending at the end of the transition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instrument.

* * * * * *

Mr. Egle's argument is really one of "implied repeal". In his view, the reference in section 6 of Article XI to "the civilian courts of the United States of America in the Republic of Panama" includes the United States Court of Appeals for the Fifth Circuit, and the phrase "during the transition period" therefore limits appellate jurisdiction as well as the jurisdiction of the district court. He notes the obvious practical difficulties that the abolition fo the district court entails, and argues that the lack of an available forum to which to remand the action should such a disposition be necessary requires us not to consider the appeal at all. That the drafters of the treaty did not provide a mechanism other than consultation by the respective governments for post-transitional period disposition of cases pending in the district court or cases on

appeal, and that no consultation has occurred, requires us, according to Mr. Egle, to leave the parties where they stood at midnight of March 31, 1982.[17]

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[17]Mr. Egle correctly observes that the same panel of this Court as that to which the Egle case was originally assigned, in unpublished opinion dated March 29, 1982, granted a Canal Zone prisoner's motion to expedite his appeal and reversed his convictions. That per curiam opinion reads, in its entirety:

IT IS ORDERED that appellant's motion to expedite the appeal in this case is GRANTED.

The appellant having served a substantial portion of his sentence, and his sentence being one for misdemeanors only, and the jurisdiction of this court being within three days of termination so that

there is not time for oral argument on this appeal, his convictions are REVERSED. United States v. Allen, 673 F.2d 1325 (5th Cir. 1982) [capitalization in original, emphasis added].

The supposition in Allen that the Fifth Circuit's appellate jurisdiction of appeals from criminal convictions entered by the former district court would not survive the transitional period, while understandable in view of the time constraints then existing, is simply wrong. The Panama Canal Treaty, in sections 2, 3 and 8 of Article XI of the treaty gives the United States even broader jurisdiction (over most American citizens in the former Canal Zone) in criminal matters than in civil matters, and our jurisdiction over the Allen appeal clearly would have continued beyond March 31, 1982.

The scope of the reference in section 6 to "the civilian courts" is not so clear, however. We might be persuaded that this choice of wording (as opposed to the specific wording, "the United States District Court for the District of the Canal Zone") was meant to include this court as well as the district court, but for the fact that the Canal Zone Code provided for American courts other than the district court.[18] A choice of wording broader than the formal title of the former district court does not

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[18]Pursuant to the Canal Zone Code, the American courts established in the Canal Zone were the district court (comprising two divisions) and Magistrates' Courts in the various subdivisions of the Canal Zone. C.Z.Code tit. 3, §§ 1, 2 and 81.

necessarily suggest inclusion of this court within the scope of section 6. Additionally, the wording "the civilian courts of the United States of America" is modified by the phrase "in the Republic of Panama," a phrase that is ostensibly geographic in scope. While section 6 could be construed as referring to all civilian courts exercising any jurisdiction over cases filed in the Canal Zone courts, the phrasing on which Mr. Egle relies is at best ambiguous in its support of his interpretation.

The treaty's abolition of the district court did not necessarily eliminate all possibility that a remand procedure might be constructed which would be consistent with this Court's retention of appellate jurisdiction of the Canal zone district court's decisions. We note that during the second session of the Ninety-seventh

Congress, a bill was introduced which would have transferred jurisdiction and venue of civil actions pending in the Canal Zone district court on March 31, 1982, to the United States District Court for the Eastern District of Louisiana.[19] Unfortunately (for its passage would have solved the jurisdictional problem presented by this case), that bill languished in the committee to which it was assigned. However, both the procedure set forth in that bill, and the consultation provision of Article XI, section 7 of the treaty suggest that the treaty was not so inflexible as to require that a case pending at the close of the transitional period could not be decided on appeal after the end of that period where filings were otherwise timely.

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[19] H.R. 5601 would have repealed certain laws as of April 1, 1982, would have pro-

The other possible source of an implied repeal of our jurisdiction to review this case, the Panama Canal Act of 1979 neither expressly states nor implies that this court's appellate jurisdiction over Canal Zone district court cases is to terminate on any particular date. Indeed, 22 U.S.C. § 3841 (the codification of Title II, § 2201 of the Panama Canal Act of 1979) specifically names only the

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vided for transfer to the United States District Court for the Eastern District of Louisiana of cases pending in the United States courts in Panama at the end of the transitional period, and would have vested jurisdiction in the United States District Court for the Eastern District of Louisiana in criminal proceedings on certain federal offenses committed by certain United States citizens in Panama after March 31, 1982.

United States District Court for the District of the Canal Zone and the former Canal Zone's "magistrates' courts" as subject to the jurisdictional limitations of Article XI of the Panama Canal Treaty. 22 U.S.C. § 3841(a); see also House Report No. 96-98 Part I, reprinted in 1979 U.S. Code Cong. & Adm.News 1034, 1081-82.

[2,3] But even if we were persuaded that either the Panama Canal Treaty at the time of its ratification or the Panama Canal Act of 1979 at the time of its enactment implied a repeal of 28 U.S.C. §§ 41 and 1291, the amendments to those statutes, effective April 2, 1982, remove the necessary chronological foundation of an implied repeal. Under our Constitution, treaties and statutes are equal in dignity. If a treaty and a statute are inconsistent, "the one last in date will control the other...." Whitney v. Robertson, 124 U.S.

190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386 (1888); Brandon v. S.S. Denton, 302 F.2d 404, 414 (5th Cir.1962). Both the treaty and the 1979 Act antedate these amendments, and the amendments left intact references in §§ 41 and 1291 to our appellate jurisdiction of decisions of the Canal Zone district court.[20]

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[20]At the same time that we requested supplemental briefs from the parties, we asked the Legal Advisor of the United States Department of State to present the Department of State's views on the jurisdictional questions raised by this case. As amicus curiae, the Department of State, in conjunction with the Civil Division of the Department of Justice, thereupon filed a brief and participated in oral argument. We note that the position of the executive branch (as asserted in the amicus brief and

III. The Merits of the Modification Order

[4,5] Our conclusion that the Panama Canal Treaty does not remove our post-March 31, 1982 appellate jurisdiction over decisions of the former district court requires us to review Judge McFadden's modification of the Egles' custodial and property rights on its merits. Custody decrees, even when denominated as "final" are by nature subject to modification as circumstances change. Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206, 209 (1934). Whether a modification is warranted depends

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on oral argument) is in accordance with our own, that neither the Panama Canal Treaty nor any subsequent act of Congress has repealed our section 1291 jurisdiction to review this case.

upon the facts and circumstances of each case, and the trial court's broad discretion to modify a custody decree will not be disturbed absent an abuse of that discretion or application of an erroneous legal standard. See In re the Marriage of Ciganovich, 61 Cal.App.3d 289, 132 Cal. Rptr. 261, 264 (1976); Philbin v. Philbin, 19 Cal.App.3d 115, 96 Cal.Rptr. 408, 410 (1971).

[6] There is some authority for the proposition that a court's discretion to modify the custody or visitation provisions of a divorce decree, while broad, is less broad than the discretion possessed at the time that the original decree is fashioned. Teta v. Teta, 297 So.2d 642, 646 (Fla.Ct. App. 1974). However, such statements as to the limits upon discretion to modify an existing decree merely account for the fact that the standard in setting custody and

visitation rights is the best interests of the children while the standard for modification is whether circumstances have changed which materially affect those interests. There must, of course, be sufficient evidence to support the district court's factual findings which form the basis for the modification ordered. See Davis v. Davis, 41 Cal.2d 563, 261 P.2d 729, 731 (1953); Disney v. Disney, 121 Cal.App.2d 602, 263 P.2d 865, 869 (1954). In reviewing the sufficiency of the evidence to support those findings, however, we must view the evidence in the light most favorable to the appellee. In re the Matter of Volkland, 74 Cal.App.3d 674, 141 Cal.Rptr. 625, 628 (1977).

[7] We find Mr. Egle's argument that the Canal Zone Code provided for a lesser standard than the "change of circumstances" standard, while having some basis in the

literal wording of that code, unsupported by case law, practical experience, logic, or common sense. Section 235 of Title 8 of the Canal Zone Code states, in pertinent part:

> The court, in rendering a decree of divorce may make such order touching the alimony and maintenance of the husband or wife, the care, custody, and support of the children, or any of them, as from the circumstances of the parties and the nature of the case, is reasonable and just ....
> On application, the court may from time to time, make such alterations in the allowance of alimony and maintenance and the care, custody, and support of the children as appear

reasonable and proper....

C.Z.Code tit. 8, § 235 (1962), 76A Stat. 1, 684 (1962) [emphasis added]; redesignated and continued partially in force by the Panama Canal Act of 1979, Pub.L. No. 96-70, § 3303(b), 93 Stat. 452, 499. From this statute, Mr. Egle argues that modification of custody need not be premised upon a change in circumstances but must merely be "reasonable and proper" in light of the welfare and best interests of the children. Such a view denies any finality to custody decrees; modification hearings under Mr. Egle's interpretation of section 235 are de novo proceedings rather than an examination focusing upon whether any changed circumstances justify a change in custody.

Mr. Egle does not cite any case from the former district of the Canal Zone which applies his interpretation of section 235. Indeed, neither party has cited

any case which construes that section, nor has our research disclosed any such case.[21]

Even California cases, which the appellant's counsel urges are likely to be more appropriate in construing provisions

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[21]The absence of published Canal Zone cases touching upon modification of divorce decrees requires us to turn to cases from other jurisdictions for guidance in deciding this one. The only case which conceivably supports the argument that section 235 does not require a showing of a change in circumstances but merely requires that modification be "reasonable and proper" is In re Adoption of Adella Markert, cited in the Canal Zone Code Annotated at "3 C.C. 501 (D.C.C.Z.Bal.Div.1925)"; see 3 C.Z. Code Annotated at 308. Assuming that Markert is somewhere available in published form, it predates the most recent

of the Canal Zone Code than are cases from other jurisdictions,[22] generally apply the "change in circumstances" rule to motions for modification of divorce decrees. E.g., Titcomb, supra; Ciganovich, supra; Philbin, supra; Thompson v. Thompson, 142 Cal.App. 2d 741, 298 P.2d 866 (1956). Interestingly, the California cases apply the change in circumstances standard even though the relevant section of the California Civil Code--like section 235 of the Canal Zone Code--does not explicitly state

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version of the Canal Zone Code (1962) and the 1934 version of that code.

[22]Appellant's counsel, who practiced law in the former Canal Zone for several years, informed us during oral argument that the Canal Zone Code was "patterned" upon the California Code. See also 3 C.Z. Code Annotated at 310, noting that the

"Code of the Canal Zone (1934) was an adaptation to a great extent of the laws of California with reference to property rights of husband and wife." As the Canal Zone Code Annotated indicates, the current section 235 was "based on" section 120 of Title 3 of the Code of the Canal Zone (1934), but the notation indicates that section 120 of the 1934 Code was derived from earlier federal provisions. Id. at 307. Although we accept the general proposition that much of the 1934 Code was based on the California Civil Code and that the 1962 Canal Zone Code may still be largely traceable to earlier California law, the precise origin and development of section 235, fascinating as it may be, is a task which, under the circumstances, we have decided to forego.

that a finding of a change in circumstances material to the best interests of the children is a prerequisite to modification of a divorce decree. Section 4603 of the California Code states, in its entirety:

> Without filing a petition pursuant to Section 4503, husband and wife may bring an action for the exclusive custody of the children of the marriage. The court may, during the pendency of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education and control of the children of the marriage as may be just and in accordance with the natural rights of the parents and the best interests of the children. Such order

> or decree may be modified or revoked at any time thereafter as the natural rights of the parties and the best interests of the children may require.

[Emphasis added.] Section 4603, with its reference to "the natural rights of the parties and the best interests of the children" is arguably as broad and as amorphous as the "reasonable and proper" phrase contained in section 235 of the Canal Zone Code, but the California courts have nonetheless usually required a showing of changed circumstances before modifying decrees.

The Virgin Islands Code presents a similar situation where an arguably broad status (Virgin Islands Code § 110), containing no reference to a finding of a change in circumstances being a prerequisite to the modification of a divorce

fication, a change of circumstances must have occurred between entry of the final divorce decree on June 19, 1981, and the entry, on December 15, 1981, of Judge McFadden's order modifying that decree, and we ought not examine the period marked by the entry of the interlocutory decree (July 18, 1980) and the entry of the final decree. She also argues that if a change in circumstances occurred, Judge McFadden erred in concluding that a change in custody was in the best interests of the children.

[8] From our own examination of the record, we conclude that there was sufficient evidence to support Judge McFadden's finding that Mrs. Egle had attempted to interfere with her former husband's maintenance of a parental relationship with his children, and we cannot conclude that this finding was "clearly erroneous."

Nor can we conclude that Judge McFadden erred in determining that Judge Pittman's order put her on notice that further interference with Mr. Egle's exercise of his visitation rights might jeopardize her custody of the children and that Mrs. Egle had not heeded Judge Pittman's warning.

The question of whether Mrs. Egle acted in disregard of her former husband's rights as a parent by attempting to alienate his children from him and to frustrate his exercise of visitation rights hinges upon the credibility of witnesses. Giving due regard to Judge McFadden's opportunity to assess their credibility, we cannot say that it was clearly erroneous to conclude that the truth was closer to Mr. Egle's version of the facts than to that asserted by Mrs. Egle. It is significant that the guardian corroborated Mr. Egle's testimony in every key respect.

Furthermore, Mrs. Egle's testimony that she believed that she had told the guardian on July 17 that she was thinking of moving from Miami might easily be viewed as incredible, given the guardian's testimony and the absence of any similar musings by Mrs. Egle to her former husband. The way in which Mrs. Egle carried out her move to Palm Coast supports the inference that her intent was, at least in substantial part, to impede visitation. Although the testimony of both Mr. and Mrs. Egle and of the guardian is largely general and impressionistic, and specifies particular incidents altogether too infrequently, their testimony adduced a sufficient basis to support Judge McFadden's findings.

[9] Nor was it improper for Judge McFadden to hear evidence on, and consider, events which occurred before June 19, 1981, the date of entry of the final decree.

Mr. Egle alleged not only particular incidents occurring after that date, but also a continuation of a pattern of conduct. Although the focus of the hearing was properly on incidents which occurred after entry of the final decree, the theory that a continuing violation of rights had occurred makes Mrs. Egle's narrow view of the relevant time period unpersuasive. Both Judge McFadden and Judge Pittman had found in earlier hearings that Mrs. Egle had attempted to frustrate her former husband's exercise of parental rights. As the record indicates, Judge McFadden had frequent involvement in and extensive familiarity with the circumstances of this case. Cf. Davis v. Davis, 41 Cal.2d 563, 261 P.2d 729, 731 (1953) (same trial judge presided at both the divorce trial and at the subsequent modification hearings, and could be presumed to be familiar

with circumstances existing at both times). Events prior to entry of the final decree were background information which placed later incidents in context and were relevant to the question of whether Mrs. Egle had continued to act in a manner contrary to Judge Pittman's warning.[23]

We reject the suggestion that Judge Pittman's order did not put Mrs. Egle on notice that conduct in violation of the order might have consequences unfavorable

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[23]Nor do we think that entry of the final decree on July 19, 1981, bars inquiry into conduct occurring before that date where the ratification of the interlocutory decree was, as Judge McFadden explained during the modification hearing, in reality a mechanical administrative task.

to her. That order stated a clear warning that her past conduct had been unreasonable and unfair. While Judge Pittman's order did not state that future violations of Mr. Egle's visitation rights or future attempts to alienate the children from their father might result in sanctions, possibly including changing custody to the father, that is the obvious implication of his order.

Having found that the evidence was sufficient to support Judge McFadden's findings that Mrs. Egle had continued to interfere with her former husband's rights to visit and maintain parental relationships with their children, the question for our review is merely whether those findings either constitute a "change of circumstances" which justified a change of custody or come within an exception to the general rule such that a change of custody

was appropriate even if no "change of circumstances" had occurred.

[10,11] The requirement that a change of circumstances be shown before custody will be changed is not an ironclad rule. Immerman v. Immerman, 176 Cal.App.2d 122, 1 Cal.Rptr. 298, 300 (1960); In re Walker, 228 Cal.App.2d 217, 39 Cal.Rptr. 243, 246 (1964). A showing of sabotage or deliberate frustration of visitation rights provides an alternative ground for a change of custody and obviates the need to show a change of circumstances. Ciganovich, 132 Cal.Rptr. at 264.

[12-14] For example, as a general rule the custodial parent is entitled to change residences unless the move is detrimental to the child. Ciganovich, 132 Cal. Rptr. at 263. That the change of habitation practically deprives one parent of visitation rights is generally insufficient

to justify restraint upon the custodial parent's freedom of movement. Id. However, the general rule does not govern when the custodial parent's intent in changing residences is to frustrate or destroy the other parent's visitation rights. Id.; Walker v. Superior Court, 246 Cal.App.2d 749, 755, 55 Cal.Rptr. 114, 117 (1966); see also Rosin v. Superior Court, 181 Cal.App.2d 486, 500, 5 Cal.Rptr. 421, 429 (1960). Where a motive to conceal the children from the non-custodial parent or otherwise frustrate that parent's right to visit and maintain contact with the children can reasonbly be inferred from the circumstances surrounding the move by the custodial parent, a change in custody may be appropriate as a means of assuring that the rights of both parents (and those of the minor children) will be honored. Ciganovich, 132 Cal.Rptr.

at 264.

Judge McFadden found that Mrs. Egle continued to disregard her former husband's rights to visit and communicate with his children, despite Judge Pittman's warning against continuation of such conduct. As indicated, the record contains sufficient evidence in support of that finding and we cannot say that it was clearly erroneous.

[15] Mrs. Egle's conduct clearly came within a recognized exception to the general rule that a change of custody must be based upon a showing of a material change of circumstances. See Ciganovich, supra. Judge McFadden's order changing custody would be appropriate even if Judge Pittman had not previously entered an order warning Mrs. Egle against continuing to interfere with her former husband's rights. That warning, however,

set forth an expectation that Mrs. Egle would refrain from interfering with her former husband's rights. In light of Judge Pittman's warning, her subsequent conduct can be viewed as a change from the circumstances and conduct which was anticipated at the time that primary custody was awarded to her.

[16] Mrs. Egle also argues that Judge McFadden erred in concluding that a change of custody was in the best interests of the children. She notes the guardian's opinion that notwithstanding attempts to alienate the children from their father, Mrs. Egle was a good mother and should retain primary custody. Mrs. Egle argues that her intent in moving to Palm Coast was to provide the children with a more spacious home than was available to her in Miami, and that she regarded Palm Coast as a better place to raise

children than either Miami or the former Canal Zone.

On the basis of this record, we think that Judge McFadden was entitled to disagree with the guardian on the ultimate question of whether primary custody should be taken from Mrs. Egle and given to Mr. Egle. The preservation of relationships with both parents is normally in the best interests of children, an we see no evidence in this record which indicates that maintenance of relationships with their father was not in the Egle children's best interests. Mrs. Egle's continued attempts to sabotage her former husband's maintenance of a parental relationship with them casts doubt upon her fitness to be the custodial parent. See Ciganovich, 132 Cal.Rptr. at 264. In an instance where the custodial parent has demonstrated an unwillingness to observe the other parent's

right to maintain contact with their children (and the children's right to maintain contact with the non-custodial parent), it may well be that the children's best interests will be served by changing primary custody to the parent who is more likely to honor the other parent's (and the children's) rights.

Mrs. Egle relies on Doran v. Doran, 212 So.2d 100 (Fl.Ct.App.1968), a case presenting similar facts and in which a change of custody was reversed on appeal. In Doran, the trial court found the wife in contempt of court for harassment of her former husband and frustration of his rights to visit their children. Following that initial hearing, however, the trial court declined to remove custody from Mrs. Doran, and gave her an opportunity to purge herself of contempt through future compliance with the divorce decree.

At a second hearing over a year later, the trial court found that Mrs. Doran had continued to deny her former husband his visitation rights and to harass him.[24] The trial court found Mrs. Doran in contempt of its earlier directive, sentenced her to thirty days in jail, and changed custody of the children to Mr. Doran indefinitely.

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[24]This "harassment" took the form of "throwing rocks and eggs at ... [his] residence, splattering paint on his apartment, precipitating physical violence with a girl friend of ... [her former husband], damaging his car and placing innumerable phone calls to his place of business." Doran, 212 So.2d at 104.

The Florida Court of Appeals reversed, concluding that although Mrs. Doran's conduct was clearly "irrational" and that the finding of contempt and a jail sentence were appropriate, custody should not have been taken from her as "an additional penalty" upon her release from confinement without a showing that anything beyond "a few isolated incidents" had occurred in the presence of the children and might create emotional disturbances in them or otherwise be detrimental to their welfare. 212 So.2d at 103 and 105.

As inidicated, the testimony in this case was frequently general, rarely focusing upon specific incidents. Nonetheless, there is evidence (in the testimony of Mr. Egle and of the guardian) of Mrs. Egle's statements about her former husband being made to or in the presence of the children, and evidence that the elder child had expe-

rienced significant emotional or psychological problems in connection with his parents' divorce. Given the manner of the move to Palm Coast, as well as Mrs. Egle's earlier attempts to evade her former husband and hide the children from him, we find it very difficult to believe that the Egle children were unaware of their mother's hostility toward their father.

As we have noted, the former District of the Canal Zone does not offer published cases which dispose of (or suggest an appropriate disposition of) this case. As between Doran and Ciganovich, we think that Doran is overly tolerant of irrational and vindictive behavior on the part of the custodial parent, and that Ciganovich is more persuasive in emphasizing the importance of maintaining children's relationships with both of their divorced parents and of placing the children with

that parent who appears willing to honor the rights of the children and of the other parent.

The guardian opined that frequent visitation and summertime custody would be sufficient to enable Mr. Egle to maintain parental bonds with his sons until they were mature enough and sufficiently independent of mind to disregard their mother's attitude toward their father. We cannot conclude, however, that Judge McFadden abused his discretion in rejecting a recommendation for continuation (with some tinkering) of an arrangement which had been under considerable strain previously and had broken down in connection with Mrs. Egle's move to Palm Coast. Given the record, Judge McFadden was entitled to conclude that the existing arrangement had been proven unsatisfactory, and that Mr. Egle was more likely to honor his former

wife's rights to visit and communicate with the children than she was to honor his rights to do the same.

Mrs. Egle may have had the best of intentions in moving to Palm Coast, and, apart from considerations of maintaining contact with both parents, Palm Coast may well be a "better" place than Miami or the former Canal Zone in which to grow up. But the way in which Mrs. Egle carried out this move supports the inference that her intent was, at least in substantial part, to impede visitation. Nor can we conclude that Judge McFadden erred in deciding that whatever financial, environmental, educational, and other advantages Palm Coast may possess vis-a-vis Miami or the former Canal Zone do not outweigh the benefits of maintaining relationships between these children and each of their parents.

[17] Mrs. Egle characterizes Judge

McFadden's decision as motivated by a desire to punish her for her failure to dismiss her Dade County lawsuit for several weeks following receipt of his order to do so. When he found Mrs. Egle in contempt, Judge McFadden declined to impose a fine or period of imprisonment, and stated that his fiding of contempt would not determine his decision on modification of custody. Judge McFadden later cited her institution of the Dade County lawsuit as "designed to harass and whipsaw her former husband," and implied that her violation of his order to dismiss the action was prompted by the same motive. While failure to dismiss the lawsuit reasonably expeditiously might not itself support a change of the custody arrangement in this case, we think that Judge McFadden, notwithstanding his statement that his finding of contempt was not determinative of his decision, was certainly

entitled to consider that conduct, not for purposes of punishment, but, as part of Mrs. Egle's pattern of behavior in discharging her obligations as the custodial parent. As indicated, a valid reason (the preservation of the children's right to maintain relationships with their father and his right to maintain parental relationships with them) existed for this change. We find no evidence that suggests that Judge McFadden regarded that reason as a pretext for an unacknowledged motive.

In passing, we note that since Mrs. Egle is now married to a resident of Panama, also a canal ship captain, and spends substantial time there, the practical consequences of Judge McFadden's order, so far as her visitation rights are concerned, are less difficult for her than if she had remained exclusively a Florida resident. Assuming, as we must and do, that Captain

Egle will fully respect her visitation rights, as she did not respect his, we may hope that the present arrangements will be in the best interests of all concerned, particularly their two sons.

As indicated, Judge McFadden also reinstated Judge Pittman's order compelling Mrs. Egle to convey to her former husband her interest in their Maryland home in return for $10,000.00. Judge Pittman had previously, on August 15, 1980, set aside that order upon concluding that sections 278 and 280 of Title 8 of the Canal Zone Code did not allow for the distribution of the parties' interests in real property located outside the Canal Zone (but governed only the distribution of their Canal Zone property and of personal property located outside the Canal Zone).

[18] We do not read sections 278 and

280 as restrictively as Judge Pittman read them, and conclude that these sections do permit the divorce court to allocate the parties' interests in real property located outside the Canal Zone in arriving at a fair and reasonable distribution of the parties' various property interests. See also C.Z.C. tit. 8, §§ 239 and 240.[25] Ordinarily, we would therefore allow Judge McFadden's reinstatement of Judge Pittman's initial order respecting the Egle's Maryland home to stand. However, we see no evidence in the record as to either the extent of Mrs. Egle's interest in the home (i.e., what percentage of any amortization and of any improvements were made during the marriage) or the fair market value (in 1980,

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[25] Section 239 of Title 8 of the Canal Zone Code states:

§ 239. Disposition of community

property on divorce

(a) In case of the dissolution of the marriage by the decree of the district court, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, deems just.

(b) The court, in rendering a decree of divorce, shall make such order for the disposition of the community property, as is provided in this chapter, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

Section 240 of Title 8 of the Canal Zone Code states:

§ 240. Compelling conveyance of property belonging to other spouse

If it appears to the court that either party holds the title to property equitable belonging to the other, the court, in rendering a decree of divorce may compel conveyance thereof to the party entitled to it, upon such terms as it deems equitable.

at the time of Judge Pittman's initial order) of the property. Not being in a position to determine the fairness of the exchange (at the time it was first ordered), we reverse Judge mcFadden's reinstatement of Judge Pittman's order regarding this property, and we leave the parties to pursue whatever remedies are available to them in Maryland for the resolution of their respective interests in the property.

Judge McFadden also denied Mrs. Egle's request for attorneys' fees, reasoning that most of the legal work was the result of her own motions to modify the decree and by the defense of unwarranted conduct. At oral argument, counsel for Mrs. Egle stated that given the obvious problems in deciding where to remand this case should remand appear necessary or helpful, both he and his client had agreed to waive the issue

of attorney's fees. We therefore deem the appeal of the denial of attorney's fees withdrawn, and we need not consider whether Judge McFadden abused his discretion in denying the request in its entirety.[26]

IV. Conclusion

For the reasons stated above, we affirm the district court's modification of the custody provisions of the final divorce decree. However, we vacate the reinstatement of an order mandating conveyance of certain real property located in Maryland. The remaining appeals in this case have been withdrawn. The district court's opinions and orders in this case are therefore AFFIRMED in part and VACATED in part.

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[26]That is not to say that appellant abandoned arguments as to possible remand on the custody issue (or on the custody

issue together with other issues) via various statutory routes, e.g., 28 U.S.C. s 1405, 1406, 1631, and 2106. As we have not found remand on the custody issue (or the Maryland property issue) necessary, and as appellant has indicated willingness to forego review of the denial of fees if that would be the only issue that would be remanded to a lower court, it is unnecessary to explore whether authority to remand this case actually exists per any of the statutes cited by the appellant.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-3037

AUGUST J.C. EGLE

Plaintiff-Appellee,

versus

ANN E. SCHRAEDEL EGLE,

Defendant-Appellant.

Appeal from the United States District Court for the District of the Canal Zone

---

ON PETITION FOR REHEARING

(October 15, 1982)

Before GEE, GARZA and TATE, Circuit Judges.

PER CURIAM:

Arguable questions of jurisdiction being raised on rehearing, and the panel

being in disagreement both as to these and as to the merits, we vacate our former judgment, classify the appeal as Class IV, transfer the appeal to the oral argument calendar, and expedite it. It is so

ORDERED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-3037

Summary Calendar

AUGUST J. C. EGLE,

Plaintiff-Appellee,

versus

ANN E. SCHRAEDEL EGLE,

Defendant-Appellant.

Appeal from the United States District Court for the District of the Canal Zone

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(MARCH 31, 1982)

Before GEE, GARZA, and TATE, Circuit Judges.

PER CURIAM:

We are unable to conclude that on

making the disposition he did the dis-
district court abused his discretion
or acted in any manner clearly erroneous.

AFFIRMED.

Dissenting Opioion

TATE, Circuit Judge: I respectfully dissent. The change of custody does not appear to be grounded primarily on the welfare of the children, and I see no change of circumstances that justifies uprooting the children from the home of the custodial parent to whom originally assigned. Further, I am of the opinion that Judge Pittman correctly held that the community or separate status of the immovable property in Maryland is to be decided by the law of Maryland, and that the second judge was in error in changing this decision.

UNTIED STATES DISTRICT COURT

FOR THE DISTRICT OF THE CANAL ZONE

CRISTOBAL DIVISION

AUGUST J.C. EGLE	)	
	)	
Plaintiff	)	
	)	
-v-	)	CV 79-3348-C
	)	
ANN E. SCHRAEDEL EGLE	)	
	)	
Defendant	)	

ORDER

The Court, in its order of July 18, 1980, provided:

As a further and complete settlement of community property claims against the husband, the husband is to pay the wife on or before one year from the date of this decree $10,000 upon her delivering to him her interest in the Maryland home.

In its supplemental findings of facts and conclusions of law issued on the 15th day of August, 1980, and entered on August

19, 1980, the court set aside the above stated provision; and in its order of June 22, 1981, denied plaintiff's motion to modify the decree to settle the ownership of the property in Maryland. The court has further considered the matter and is of the opinion that the modification of August 15 and the denial of further modification of June 22, 1981 with respect to the Maryland real property was in error and that the provision in the original decree of July 18, 1980 were correct and should be reinstated.

Accordingly, it is ORDERED ADJUDGED and DECREED that the plaintiff shall deliver to the defendant within one year of the date of this order the sum of $10,000 and the defendant will deliever to the plaintiff in exchange therefor a quit claim or other appropriate deed conveying to him her interest in the Glen

Burnie, Maryland property.

Done this 16th day of December, 1981.

_____

United States District Judge

FRANK McFADDEN

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE BALBOA DIVISION

AUGUST J.C. EGLE

PLAINTIFF CV 79-3348-C

VS

ANN E. SCHRAEDEL EGEL, FINAL DECREE

DEFENDANT OF DIVORCE

In this cause of action for divorce the Interlocutory Decree of Divorce (Amended) was entered by this Court on the 8th day of October, 1980, after a hearing on June 16 thru June 18, 1980, and six (6) months having elapsed since the entry of the said Amended Interlocutory Decree adjudging the plaintiff, AUGUST J. C. EGLE, to be entitled to a divorce from the defendant herein, ANN E. SCHRAEDEL EGEL: and, the parties hereto not having become reconciled nor lived or cohabited together as man and wife

during the interlocutory period, both parties hereto being presently alive, and there being no motion to vacate or set aside said Amended Interlocutory Decree or suit or appeal pending and the plaintiff having petitioned to this Court for the entry of the Final Decree of Divorce from the defendant herein, it is THEREFORE

ORDERED, ADJUDGED AND DECREED, that the defendant is hereby granted a Final Drcree of Divorce nunc pro tunc to May 8, 1981, and subject to the terms and conditions of the Court's Interlocutory Orders of July 18, 1980, August 15, 1980, which are attached to and incorporated by reference. The bonds of matrimony heretofore subsisting between the plaintiff and the defendant, ANN E. SCHRAEDEL EGLE, be and the same are hereby dissolved, cancelled, set aside and

forever held for naught; and, that the parties hereto and each of them, is hereby restored to all rights, privileges and immunities of single, unmarried persons.

DATED: 19 JUNE 1981

SIGNED:

_____

FRANK H. McFADDEN

United States District Judge

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF THE CANAL ZONE

CRISTOBAL DIVISION

AUGUST J. C. EGLE, Plaintiff,	)	
V.	)	CV 79-3349-C
ANN E. SCHRAEDEL EGLE, Defendant.	)	

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the decree signed July 18, 1980, it was stated the court would make supplemental Findings of Fact and Conclusions of Law with reference to the remaining property rights and visitation rights of the father. The supplemental Findings and Conclusions are set out hereafter.

FINDINGS OF FACT

At the time of the marriage, the plaintiff husband brought into the mar-

riage $2,500 savings and an interest in the Maryland home place. On page 5, second paragraph, of the July 18, 1980, order, the court set out that the wife had withdrawn checking funds from three Miami banks totaling $2,188.26. On page 7 of the July 18, 1980, order, third paragraph, the court set out that the husband had $579.00 in a Panama savings account and a blank amount in Maryland. The evidence is in conflict with respect to how much was in the Maryland account, ranging from approximately $400.00 to the defendant wife's claim that he had approximately $4,000.00 in the account.

The pattern of the testimony of the wife in this case, together with the court's observation of her, lead the court to discredit her estimates. Considering all of the above factors, including the amount of money he brought

to the marriage, the court finds that the amount of savings she withdrew is a fair share of the total savings.

The evidence before the court is that the value of his retirement fund as of January 1980, was $34,003.22. This is not a lump sum payment due upon retirement, but payable in monthly installments and is not payable until retirement. The provisions for this division is set out hereafter.

In order to clarify this court's July 18, 1980, order, not only the "collector's item" furniture is to be divided according to the plan set out in that order, but the same plan is to be followed with reference to all "other" household goods, excluding those he brought into the marriage.

VISITATION PRIVILEGES OF THE FATHER

The father has the right to the

custody of both children as hereafter set out.

Any additional visitation privileges not set out herein which are mutually agreeable between the parties is encouraged.

CONCLUSIONS OF LAW

Re: Community Property

The Canal Zone Code provides for certain community property rights, to wit, Title 8, § 280:

> § 280. Community property; presumptions
>
> (a) Except as provided by sections 278 and 279 of this title, personal property, wherever situated, acquired after marriage by either husband or wife, or both, while residing in the Canal Zone,

is community property; but whenever personal property, or an interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that it is her separate property, and if acquired by her and another person, ther presumption is that she takes the part acquired by her, as an interest in common, unless a different intention is expressed in the instrument; except that when personal property is acquired by husband and wife by an instrument in which they are described as husband and

wife, unless a different intention is expressed in the instrument, the presumption is that the property is the community property of the husband and wife.

(b) The presumptions provided for by subsection (a) of this section are conclusive in favor of a person dealing in good faith and for a valuable consideration with the married woman or her legal representatives or successors in interest, and regardless of a change in her marital status after acquisition of the property. 76 A Stat. 686."

Title 8, § 278:

§ 278. Separate property

generally

The following property, with the rents, issues and profits thereof, is the separate property of a spouse:

(1) property owned by the spouse before marriage and;

(2) property acquired by the spouse after marriage by gift, bequest, devise, or descent.

The wife may convey her separate property without the consent of her husband. 76A Stat. 686."

Title 8, § 279 has no application in this case.

The personal property accumulated during their marriage has been divided pursuant to these provisions.

In the July 18, 1980, order, page 9, next to the last paragraph, provided:

> "As a further and complete settlement of community property claims against the husband, the husband is to pay the wife on or before one year from the date of this decree $10,000 upon her delivering to him her interest in the Maryland home."

Since the Canal Zone Code makes no provision for community property with reference to real property, this portion of the July 18 order was in error and is hereby set aside subject to the provisions hereafter set out.

It is therefore ORDERED, ADJUDGED, and DECREED that:

(1) The amount of money withdrawn

from the three banks in Miami by the defendant wife is her fair share of the savings.

(2) The division of the retirement fund of $34,003.22 is to be made in this manner: The nusband has a $30,000 life insurance policy with United Benefit Life Insurance Company with the wife named as beneficiary. The husband is to pay the premiums and maintain this insurance policy with the wife, Ann E. Schraedel Egle, as beneficiary. Upon this retirement, the wife may make an election, to wit: (a) the wife may elect to continue to be named as the beneficiary with the husband paying the premiums of this $30,000.00 policy, and relinguish the insurance policy in which she is named as beneficiary and elect to receibe the $17,001.61 portion of the retirement as community property. If

she elects to receive her share of the retirement benefits, the husband, at his election, may pay her the present value at the then current interest rates for commuted lump sum payment, or he may elect to pay the $17,001.61 monthly, calculated on his then life expectancy.

(3) Not only is the "collector's item" furniture to be divided according to the plan set out in the July 18, 1980, order, but the same plan is to be followed with reference to all "other" household goods. The "other" household goods lists are to be prepared by the husband or wife who has all or portions of the household goods in their possession. If two lists dividing the "other" furniture have not been furnished to each other previously, such lists or divisions are to be provided to each other within 45 days of the date of the

filing of this order in the Canal Zone Clerk's Office, and an election is to be made by the other party within 30 days thereof. Copies of the lists and the election are to be furnished to each other with copy filed in the Clerk's Office.

(4) The husband is ordered to keep the two insurance policies with New York Life Insurance Company in the amounts of $10,000 and $15,000 with Erik Egle and Anders C. Egle as beneficiaries, in full force and effect. No further loans are to be made against any of the policies and the outstanding loans are to be paid off by the husband.

(5) If the husband can maintain the hospital insurance for the children on his plan with the Panama Canal Company, he is to do so.

(6) All attorney's fees and other

claims made by the wife against the husband are hereby DENIED.

(7) The wife will be responsible for insurance and maintenance on her motor vehicle.

(8) The wife will be responsible for all expenses of the children, including dental and medical expenses not covered by the hospital insurance. If extra-ordinary emergency medical expenses are incurred in amounts over $500.00 for the children, she should petition the count for relief.

(9) The father has the right to the custody of both children for two months each summer between the ending of the usual school term in May and the beginning of the new school term in September. He should give written notice by May 1 of each year of when he expects to arrive and take the children.

(10) Beginning Christmas of 1980, the husband shall have the children during the Christmas holidays for one week during their school holiday period, the week to be designated by the husband. He is to advise the wife and mother on or before December 1, when he expects to take the children. He is to have this Christmas vacation right every other year thereafter, 1982, 1984, etc.

(11) Beginning in 1981, he is to have the children in his custody for the Thanksgiving holidays for a period of 48 Hours. He is to notify the wife and mother not later than November 1 of the date and time he desires to take the children. He is to have this visitation right every other year thereafter, 1983, 1985, etc.

(12) The husband and father may have the custody of the children any week-end

from Friday 5:00 p.m. to Sunday, 5:00 p.m., for a period of 24 hours provided he gives notice in writing not less than one week in advance.

(13) The husband is to reimburse the wife $501.00 for plane fare from Miami to the Canal Zone and return.

(14) That portion of this court's order of July 18, 1980, page 9, next to the last paragraph, beginning "As a further. . ." and ending "interest in the Maryland home." is hereby SET ASIDE unless the parties mutually agree to accept this as a division of the Maryland home. Such agreement shall be signified in writing by the husband and upon the delivery of a quit-claim deed of the wife's interest in the Maryland home place, all within 45 days of the date this order is filed in the Clerk's Office in the Canal Zone. Otherwise, the pro-

vision with reference to the Maryland property in the July 18, 1980, order is null and void and the laws of the State of Maryland, United States of America, will govern the respective interests of the husband and wife in the Maryland home place as set out in their deeds of conveyance.

It is further ORDERED, ADJUDGED, and DECREED that the $500.00 each two weeks as payment of alimony and support of the minor children will continue until the oldest child, Erik, reaches his majority according to the laws of the State of Florida, or he becomes self-supporting, whichever occurs first. At that time the husband should petition the court for relief. In the event of the remarriage of the wife, Ann E. Schraedel Egle, she is to immediately notify the court and the husband, August

J. C. Egle, in writing, and the husband, August Egle, should petition the court for relief. The court may give relief retroactive of the date of remarriage.

Costs are taxed against the wife, Ann E. Schraedel Egle.

Done, this the 15th day of August, 1980.

Virgil Pittman

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

April 27, 1984

Mr. Benjamin A. Neil
Attorney at Law
421 South Highland Avenue
Baltimore City, Maryland 21224

No. 82-3037 - Egle v. Egle

Dear Sir:

Enclosed is a copy of the Court's order entered this date which is self-explanatory.

Also enclosed is the three volume transcript of proceedings held in the above cause for the Honorable Virgil Pittman on June 16, 17, and 18, 1980 which was received this date. In light

of the court's order having been entered, same is being returned to you for your files.

Very truly yours,
GILBERT F. GANUCHEAU,
CLERK

BY:_____
Barry W. Stieberg,
Chief Judicial
Support Division

BWS/prb
Enclosures
cc:Mr. Charles Flaxman
Mr. Edward C. Vining
Mr. Albert J. Joyce, Jr.
Mr. Howard S. Scher
Mr. Neil Flaxman